UNITED STATES BANKRUPTCY COURT
FOR THE WESTERN DISTRICT OF NORTH CAROLINA
Charlotte Division

In re:	:	Case No. 10-BK-31607
GARLOCK SEALING TECHNOLOGIES, LLC, *et al.*,	:	Chapter 11
Debtors.	:	Jointly Administered

APPENDIX A

TO THE POST-HEARING RESPONSE BRIEF OF THE OFFICIAL COMMITTEE OF ASBESTOS PERSONAL INJURY CLAIMANTS FOR ESTIMATION OF PENDING AND FUTURE MESOTHELIOMA CLAIMS

STATE LAW CAUSATION CASES

California

Rutherford v. Owens-Illinois, Inc., 941 P.2d 1203, 1207, 1214, 1219 (Cal. 1997)

- "[P]laintiffs may prove causation in asbestos-related cancer cases by demonstrating that the plaintiff's exposure to defendant's asbestos-containing product in reasonable medical probability was a substantial factor in contributing to the aggregate dose of asbestos the plaintiff or decedent inhaled or ingested, and hence to the risk of developing asbestos-related cancer, *without the need to demonstrate that fibers from the defendant's particular product were the ones, or among the ones, that actually produced the malignant growth*." (emphasis added).

- Plaintiff "is free to further establish that his particular asbestos disease is cumulative in nature, with many separate exposures each having constituted a 'substantial factor' that contributed to his risk of injury."

- "Undue emphasis should not be placed on the term 'substantial . . . .'"

- "[A] defendant cannot escape *liability* simply because it cannot be determined with medical exactitude the precise contribution that exposure to fibers from defendant's products made to plaintiff's ultimate contraction of asbestos-related disease . . . ." (emphasis in original).

Pfeifer v. John Crane Inc., No. B232315, 2013 WL 5815509, at *6 (Cal. Ct. App. 2013)

- "In the context of injury claims based on exposure to asbestos from multiple sources, plaintiffs may establish that asbestos from a specific defendant's product was a 'cause in fact' of their cancer by showing that the asbestos 'was a substantial factor contributing to the . . . *risk* of developing cancer'" *Rutherford v. Owens-Illinois, Inc.*, 941 P.2d 1203, 1214, 1220 (Cal. 1997). "To make this showing, plaintiffs need not demonstrate that the specific asbestos particles from the defendant's products actually caused the cancer. Rather, the showing may be based on expert testimony regarding the size of the 'dose' or the enhancement of risk attributable to exposure to asbestos from the defendant's products." *Id.* at 1219. "Nonetheless, plaintiffs must demonstrate conduct that 'was a substantial factor in contributing to the aggregate dose of asbestos the plaintiff . . . inhaled or ingested, and hence to the risk of developing asbestos-related cancer.'"

Grammer v. Advocate Mines, Ltd., MDL No. 875, Civ. No. 2:09-92425, 2011 WL 6016980, at *1 (E.D. Pa. Dec. 2, 2011) (applying California law)

- Denying defendant's summary judgment motion where evidence showed that four of defendant's boilers were aboard the ship plaintiff worked on, witnesses saw plaintiff clean and repair these boilers on an almost daily basis, witnesses testified that dust was released when plaintiff performed his work, and defendant's corporate representatives testified that the boilers in question contained asbestos.

Order, *Lindenmayer v. Allied Packing & Supply, Inc.*, No. RG09483370, slip op. at 2 (Cal. Super. Ct. June 18, 2010) (attached as **App. A Ex. 1**)

- Denying defendants' summary judgment motion where plaintiff offered evidence "that Plaintiff worked in Engine Room No. 2 for three years, that the original gaskets and packing on Copes-Vulcan supplied equipment would have been replaced during that period of time, that Defendants provided some replacement gaskets, that the gaskets and packing contained asbestos, and that the process of replacing the gaskets and packing released dust into the air."

Connecticut

Memorandum Decision, *Accurso v. A.O. Smith Corp.*, No. CV08-5017803S (Conn. Super. Ct. July 15, 2011) (attached as **App. A Ex. 2**)

- Denying summary judgment where plaintiff testified that he was exposed to defendant's asbestos-containing product through work on defendant's boiler and through asbestos drift, even though defendant offered evidence that it did not manufacture boilers during the relevant time.

Ciccomascolo v. ACandS, Inc., No. CV020390687S, 2004 WL 2223066, at *1 (Conn. Super. Ct. Sept. 10, 2004)

- Denying summary judgment where plaintiff alleged exposure to dust from defendant Yarway's gaskets brought home on her husband's and father's clothing: "the second key issue in this case is not whether there should be a presumption of causation if a plaintiff merely shows that asbestos products manufactured by the defendant were in use at a particular job site but whether a reasonable jury could accept that the plaintiff's expert testimony that any exposure is a proximate cause of this plaintiff's injury. A reasonable jury, giving all reasonable inferences to the plaintiff for purposes of this motion, could find, by a preponderance of the evidence, that the plaintiff was exposed to defendant's product, and, according to her expert, this exposure was a substantial contributing factor that caused her illness."

Delaware

Cain v. Green Tweed & Co., 832 A.2d 737, 741-42 (Del. 2003)

- Plaintiff must show "that the asbestos product was used in an area where the plaintiff frequented, walked by, or worked adjacent to, with the result that fibers emanating from the use of the product would have been present in the area where the plaintiff worked."

- Denying summary judgment where plaintiff "specifically remembered having used Green Tweed products from the sixties through the eighties; (2) Cain knew those products included the Palmetto asbestos product, because the box in which the packing came was labeled 'Palmetto;' (3) Cain knew that the packing product labeled 'Palmetto' contained asbestos, because the asbestos-containing product had been specified for the tasks that he was then performing; (4) when Cain used the product, dust was created as a result of his pulling the rope-like material out of the box and cutting it; and (5) that dust contained asbestos to which Cain was exposed."

Happel v. Anchor Packing Co., MDL No. 875, Civ. No. 09-70113, 2010 WL 7699153, at *1 & n.1 (E.D. Pa. Oct. 13, 2010) (applying Delaware law)

- "[A] plaintiff asserting a claim for asbestos-related injuries must introduce evidence showing a product nexus between defendant's product and plaintiff's asbestos-related injuries."

- "To meet this 'product nexus' standard, Plaintiff must establish a connection in space and time to Defendant's product. Also, Defendant's product must be capable of releasing friable asbestos fibers."

- "Delaware courts have held that a plaintiff can survive summary judgment if there is testimony that asbestos-containing products were used at a worksite during the time plaintiff was employed there."

- Summary judgment denied where decedent's co-worker testified that "he thought" that a pump manufactured by defendant Ingersoll-Rand was in the engine room where the decedent worked, and defendant admitted that its pumps contained asbestos-containing sealing and gaskets.

District of Columbia

Weakley v. Burnham Corp., 871 A.2d 1167, 1169-70, 1173 (D.C. 2005)

- Reversing trial court's grant of summary judgment where plaintiff Mr. Weakley presented evidence and testimony that "'[he] and [each of] the defendants' [asbestos-containing] products were in the same place at the same time,' as required by our decision in *Claytor v. Owens-Corning Fiberglas Corp.*, 662 A.2d 1374, 1384-85 (D.C.1995); and (2) Weakley's expert witness, M. Anthony Casolaro, M.D., a pulmonologist, stated in his affidavit, to a reasonable degree of medical certainty, that as a result of Weakley's regular exposure to asbestos while working on boilers, he developed asbestosis, and that 'each and every exposure to asbestos from boilers containing, or covered with, asbestos materials was a significant causative factor in the development of asbestosis in Mr. Weakley.'"

- "Weakley has stated under oath that he 'frequently' worked on boilers manufactured by each of the appellees, and that he has thus been present at the same place and at the same time, and 'regularly' exposed to, the asbestos that he attributes to the appellees. . . . We do not read the 'same time and same place' minimum standard as requiring the plaintiff to recall and specify a *particular* time and a *particular* place." (emphasis in original).

- "Weakley must, of course, also establish that his exposure to each defendant's product was a 'substantial factor' contributing to his having contracted asbestosis. For summary judgment purposes, however, this element is satisfied by Dr. Casolaro's expert testimony."

Florida

Hays v. A.W. Chesterton, Inc., MDL No. 875, Civ. No. 2:09-93728-ER, 2011 WL 6026691, at *1 & n.1 (E.D. Pa. Nov. 7, 2011) (applying Florida law)

- Denying summary judgment where plaintiff testified that, while employed by the Navy, he regularly removed asbestos packing from valves produced by a number of manufacturers, including defendant, that the packing contained asbestos, and that dust was generated when the packing was removed.

Faddish v. Warren Pumps, LLC, MDL No. 875, Civ. No. 09-70626, 2010 WL 4178337, at *1 & n.1 (E.D. Pa. Oct. 22, 2010) (applying Florida law)

- "[U]nder Florida law, a plaintiff must simply show that a defendant's product was a 'substantial contributing factor' to the injury that occurred." (citing Asbestos and Silica Compensation Fairness Act, Fla. Stat. § 774.205)).

- Denying summary judgment where plaintiff testified that replacing packing created dust which he breathed, and presented evidence that defendant's pumps were in the engine room where plaintiff worked, and that the pump specifications called for the use of asbestos-containing gaskets and packing.

Constantinides v. Leslie Controls, Inc., MDL. No. 875, Civ. No. 09-70613, slip op. at 2-3, 11-12 (E.D. Pa. Oct. 8, 2010) (applying Florida law) (attached as **App. A Ex. 3**)

- Evidence was adduced that plaintiff had worked for 15 months in a boiler room that contained "numerous pipes and machinery encased in external asbestos insulation," that six valves manufactured by defendant were present, and that plaintiff "occasionally" removed and replaced asbestos gaskets and packing on valves, which were covered with asbestos insulation. Plaintiff's expert opined that plaintiff's "asbestos exposure was the cause of his asbestos-related pleural plaques and of his malignant mesothelioma." Defendant's expert opined that plaintiff's "potential work with [defendant's] valves was medically insufficient to cause injury," and that "the exposure resulting from replacing asbestos components of the valves in question

would have produced an asbestos concentration in the boiler room no greater than that found in ambient air." The court denied defendant's motion for summary judgment, rejecting defendant's argument that plaintiff's expert's opinion was too "general [and] speculative" to raise a genuine issue of fact, and holding that there was a "genuine issue of material fact as to whether asbestos components of [defendant's] valves caused [plaintiff's] injuries."

Illinois

Thacker v. UNR Indus., Inc., 603 N.E.2d 449, 455, 459 (Ill. 1992)

- Defendant Manville Corporation was not entitled to a judgment *n.o.v.,* despite the relatively small amount of asbestos it supplied to the UNARCO plant where decedent worked, the large quantity of asbestos supplied from other sources, and decedent's testimony he did not work with the Manville asbestos, as plaintiff presented "testimony, albeit slight, indicating that Manville asbestos necessarily generated dust which became part of dust which circulated throughout the facility."

Zickuhr v. Ericsson, Inc., 962 N.E.2d 974, 986-87 (Ill. App. Ct. 2011)

- "Because of the problems associated with proving one's present condition was caused by past exposure to a product, Illinois courts have not required a finding of the exact quantity of asbestos fibers a decedent was exposed to."

- Finding sufficient cause and upholding jury verdict where decedent testified that he worked with defendant's wire and cable containing asbestos from 1955 to 1984, he stripped or shaved the wires everyday, and that this work produced dust.

Caruso v. M & O Insulation Co., 802 N.E.2d 327, 331 (Ill. App. Ct. 2003)

- A "plaintiff may meet his or her burden of proving causation with circumstantial evidence; Illinois law does not require unequivocal or unqualified evidence of causation."

Johnson v. Owens-Corning Fiberglas Corp., 729 N.E.2d 883, 887, 889 (Ill. App. Ct. 2000)

- The plaintiff "must show that the injured party was exposed to the defendant's asbestos through proof that he regularly worked in an area where the defendant's asbestos was frequently used and the injured party worked in sufficient proximity to this area so as to come into contact with the defendant's product. This test is often referred to as the 'frequency, regularity and proximity' or 'substantial-factor' test." (citing *Thacker, supra.)*

- However, the substantial factor test does not require "that a plaintiff must prove that he was exposed to a substantial number of the defendant's asbestos fibers. In actuality, the substantial-factor test is not concerned with the quantity of asbestos but

its legal significance. Where there is competent evidence that one or a *de minimis* number of asbestos fibers can cause injury, a jury may conclude the fibers were a substantial factor causing a plaintiff's injury."

Tragarz v. Keene Corp., 980 F.2d 411, 421 (7th Cir. 1992)

- Under Illinois law, "the frequency, regularity, and proximity test becomes even less rigid for purposes of proving substantial factor when dealing with cases in which exposure to asbestos causes mesothelioma. . . . [T]he reason for this diminished importance is that mesothelioma can result from minor exposures to asbestos products – a fact made evident by the medical testimony, OSHA regulations, and EPA regulations that are part of the record in this case."

- Under Illinois law, "the plaintiff's exposure to each defendant's product should be independently evaluated when determining if such an exposure was a substantial factor in causing the plaintiff's injury—meaning that evidence of an exposure to other manufacturer's products is not relevant to such an inquiry."

Kinser v. Anchor Packing Co., MDL No. 875, Civ. No. 2:08-cv-92034, 2012 WL 2826883, at *1, n.1 (E.D. Pa. Apr. 5, 2012)

- Court rejected defendant Westinghouse's motion for summary judgment on grounds that the plaintiff had not shown that "(1) Plaintiff was exposed to asbestos from a Westinghouse product with any frequency or regularity, or with the requisite proximity, or (2) any such exposure was significant enough in the context of his lifelong accumulation of asbestos exposures to be a 'substantial factor' in causing his illness (as opposed to a non-actionable 'de minimis' exposure)," and held that: "There is evidence that Plaintiff was exposed to dust from asbestos gaskets that he ground off of a Westinghouse turbine. . . . [A] reasonable jury could conclude from the evidence that Plaintiff was exposed to asbestos from gaskets supplied by Westinghouse with its turbines such that they were a 'substantial factor' in the development of his illness." *Nolan v. Weil-McLain,* 910 N.E.2d 549, 557 (Ill. 2009); *Thacker v. UNR Indus., Inc.*, 603 N.E.2d 449, 454-55 (Ill. 1992). "Accordingly, summary judgment is not warranted with respect to this alleged exposure."

Iowa

Spaur v. Owens-Corning Fiberglas Corp., 510 N.W.2d 854, 861 (Iowa 1994)

- Rejecting defendant's argument that the plaintiff "must prove how much [defendant's product] actually contributed to his disease process" and holding that "it is not necessary and indeed may be impossible to establish exactly how much one party's asbestos product contributed to the resulting injury."

Kentucky

CertainTeed Corp. v. Dexter, 330 S.W.3d 64, 77 (Ky. 2010)

- Finding there was "ample evidence" that exposure to asbestos from products of empty-chair defendants was "a substantial factor in bringing about [plaintiff's] asbestos-related illnesses" where plaintiff's expert testified that "*every single exposure* to asbestos would have been the legal cause of [plaintiff's illnesses]."

Garlock Sealing Techs., LLC v. Robertson, No. 2009-CA-00483-MR, 2011 WL 1811683, at *4, 5, 7-8 (Ky. Ct. App. May 13, 2011) (rehearing denied Aug. 10, 2011; discretionary review denied by Supreme Court March 14, 2012).

- Affirming denial of Garlock's motion for directed verdict in lung cancer suit.

- Noting that Garlock "acknowledged that 75% to 85% of the raw material in its suspect gaskets was asbestos. However, Garlock's defense was that during the gaskets' manufacture, all the potentially friable asbestos was encapsulated in a material that, so long as it was undisturbed, prevented the asbestos fibers from being entrained in the air. . . . Removal of the old gasket is a pipefitter's job and usually destroys the encapsulating material, rendering the asbestos friable, and entraining asbestos fibers in the pipefitter's breathing zone. *See, e.g.*, *Bailey v. North American Refractories Co.*, 95 S.W.3d 868, 874 (Ky. App. 2001)." "Having heard this evidence, the jury could reasonably infer that Garlock was aware that the normal use of its product would result in a pipefitter's inhalation of friable asbestos."

- "Garlock gaskets, when used in the manner pipefitters tend to use them, produce dust which they breathe, thereby creating a risk of exposure to asbestos that causes cancer. It was reasonable for the jury to conclude that Garlock could foresee that removal of its asbestos-containing gaskets in the ordinary course of replacing them would entrain into the breathing zone of a pipefitter the very asbestos Garlock used in its manufacture of gaskets."

Bailey v. N. Am. Refractories Co., 95 S.W.3d 868, 872-73 (Ky. Ct. App. 2001)

- "Generally, the existence of legal cause is a question of fact for the jury."

- Defendants' motions for summary judgment denied where there was evidence that the defendants' products were used and generated dust at the plant where plaintiff worked, as well as expert testimony that "once released into the air these asbestos fibers could travel for long periods of time and substantial distances" and that "the asbestos-containing materials were a substantial contributing factor to appellants' diseases."

Louisiana

McAskill v. Am. Marine Holding Co., 9 So. 3d 264, 268 (La. Ct. App. 2009)

- "[I]n latent mesothelioma cases, where the human body is injured over time due to chemical exposure, the plaintiff need show only that the defendant's asbestos-containing product was a substantial factor in causing his alleged disease. This burden can be met by simply showing that he was actively working with asbestos-containing materials, such as insulating pipes or exhaust systems."

- "Medical science has proven a causal relationship between asbestos exposure and mesothelioma above background levels. Thus, such asbestos exposure is a causative factor in producing the disease."

- "[E]very non-trivial exposure to asbestos contributes to and constitutes a cause of mesothelioma."

Francis v. Union Carbide Corp., 116 So.3d 858, 860, 862-63 (La. Ct. App. 2013)

- Denying defendant summary judgment where evidence showed that: "[plaintiff's] father worked for Pendleton;" that "work with asbestos-containing materials was conducted at Pendleton while [plaintiff's] father worked there;" that plaintiff's "deposition testimony places him around his father's 'dusty' work clothing," and noting that "'[e]very non-trivial exposure to asbestos contributes to and constitutes a cause of mesothelioma.'" *McAskill v. Am. Marine Holding Co.*, 9 So. 3d 264, 268 (La. Ct. App. 2009).

Held v. Avondale Indus., Inc., 672 So. 2d 1106, 1109 (La. Ct. App. 1996)

- Genuine issue of material fact as to causation existed where plaintiff's medical expert opined that "there is no known level of asbestos [exposure] which would be considered safe with regard to the development of mesothelioma," and that "any . . . exposure, even slight exposures, to asbestos" were "significant contributing cause[s] of the [decedent's] malignant pleural mesothelioma."

Maryland

Dixon v. Ford, 70 A.3d 328, 336 (Md. 2013)

- Where wife had contracted mesothelioma after exposure to asbestos containing products used in house renovations, as well as to asbestos dust on husband's clothes, and the evidence was that "Mr. Dixon worked on Ford brakes, on average, twice a week, 10 months a year, for 13 years, and that Ms. Dixon dealt with the dust-laden clothes and the ubiquitous asbestos fibers on most of those occasions," expert testimony that each and every exposure to asbestos was a substantial contributing factor in the causation of the plaintiff's disease was admissible.

Scapa Dryer Fabrics, Inc. v. Saville, 16 A.3d 159, 163-64 (Md. 2011)

- The "'frequency, regularity, proximity' test, enunciated in *Eagle–Picher v. Balbos* [] is the common law evidentiary standard used for establishing substantial-factor causation in negligence cases alleging asbestos."

- "[E]vidence that [the plaintiff] regularly handled and/or worked in arm's length to Scapa's asbestos-containing felts on a daily basis for at least one year was legally sufficient to permit a jury question on proximate cause . . . ."

Georgia-Pacific Corp. v. Pransky, 800 A.2d 722, 725 (Md. 2002)

- Holding that there was sufficient evidence establishing causation to uphold a jury verdict in a mesothelioma case where the plaintiff's only asbestos exposure occurred as a child when she was in the room when her father was sanding Georgia-Pacific Joint Compound.

Eagle-Picher Indus., Inc. v. Balbos, 604 A.2d 445, 459 (Md. 1992)

- "In products liability cases involving asbestos, where the plaintiff has sufficiently demonstrated both lung disease resulting from exposure to asbestos and that the exposure was to the asbestos products of many different, but identified, suppliers, no supplier enjoys a causation defense solely on the ground that the plaintiff would probably have suffered the same disease from inhaling fibers originating from the products of other suppliers."

John Crane, Inc. v. Linkus, 988 A.2d 511, 521, 523 (Md. Ct. Spec. App. 2010)

- "[C]ausation does not turn on comparative faults. The question is whether each contributing cause, standing alone, is a substantial factor."

- "[L]ay testimony describing the amount of dust created by handling the products in question, coupled with expert testimony describing the dose response relationship and the lack of a safe threshold of exposure (above ambient air levels) was sufficient to create a jury question" as to whether the plaintiff's mesothelioma was caused by defendant's asbestos-containing products.

ACandS, Inc. v. Abate, 710 A.2d 944, 989 (Md. Ct. Spec. App. 1998), *abrogated on other grounds by John Crane, Inc. v. Scribner*, 800 A.2d 727 (Md. 2002)

- Considering expert testimony that "each and every" exposure to asbestos was a "substantial contributing factor in the causation" of the plaintiff's disease.

Walker v. Owens-Illinois Glass Corp., MDL No. 875, Civ. No. 2:07-62843, 2011 WL 4790626, at 1 & n.1 (E.D. Pa. Jan. 28, 2011) (applying Maryland law)

- "[T]he Court of Appeals of Maryland has liberally applied the 'frequency, regularity, and proximity' test and allowed plaintiffs to survive summary judgment with circumstantial evidence of exposure."

Massachusetts

Morin v. AutoZone Northeast, Inc., 943 N.E.2d 495, 499 (Mass. App. Ct. 2011)

- "To prove causation in an asbestos case, the plaintiff must establish (1) that the defendant's product contained asbestos (product identification), (2) that the victim was exposed to the asbestos in the defendant's product (exposure), and (3) that such exposure was a substantial contributing factor in causing harm to the victim (substantial factor)."

- "Because the resulting injury may not emerge for years or decades after exposure, the law does not require the plaintiff or his or her witnesses to establish the precise brand names of the asbestos-bearing products, the particular occasions of exposure, or the specific allocation of causation among multiple defendants' products. Evidence will be sufficient to reach the fact finder if it permits the reasonable inference of the presence at a work site of both the plaintiff and the defendant's asbestos-containing product for an appreciable period of exposure."

- Court found sufficient causation based on expert's testimony that "each and every exposure to asbestos that [plaintiff] received as a bystander to the Bedford Fruit mechanics' work with asbestos-containing vehicles . . . was a substantial contributing factor in causing [her to contract] malignant mesothelioma."

Welch v. Keene Corp., 575 N.E.2d 766, 769 (Mass. App. Ct. 1991)

- In upholding a jury's finding that defendant caused plaintiff's asbestosis, the court stated that, "[i]t is enough, however, to reach the jury that [the plaintiff] show that he worked with, or in close proximity to the defendants' asbestos products." Moreover, "a plaintiff may demonstrate exposure to a specific product through testimony of coworkers who can identify him as working with or around these products."

- "More important, [plaintiff] offered expert testimony that his asbestosis was caused by the cumulative effect of all the dust that he had inhaled over the span of his career. Because each inhalation of asbestos dust can result in additional damage to lung tissue, it is all but impossible to determine which exposure is directly responsible for the disease; nor, we add, is it [plaintiff's] burden to allocate blame."

Barraford v. T&N Ltd., 2013 WL 5407223, at *6-7 (D. Mass. Sept. 24, 2013)

- Court denied defendant's motion for summary judgment where evidence showed that plaintiff worked as engineer and was present on a regular basis while various asbestos products were used during construction of building, including defendant's product, Sprayed Limpet Asbestos, which blew up to the highest levels of the tower.

- "As to exposure, neither Massachusetts nor the First Circuit has adopted the 'frequency, regularity and proximity test' . . . . Instead, Massachusetts courts have required, in order to state a triable claim, that the person 'worked with, or in close proximity to, the defendants' asbestos products.'" *Welch v. Keene Corp.*, 575 N.E.2d 766, 769 (Mass. Ct. App. 1991).

- As to causation, "'the plaintiff need not produce evidence of "but for" causation on the part of the targeted product, but only of its contribution to causation of the resulting injury.'" *Morin v. Autozone Northeast, Inc.*, 943 N.E.2d 495, 499-500 (Mass. Ct. App. 2011) "Plaintiff has also submitted expert testimony that Daniel Barraford's exposure to Limpet was a cause of his mesothelioma and that mesothelioma caused his death. . . . Plaintiff has thus presented sufficient evidence of causation."

Michigan

Chapin v. A & L Parts, Inc., 732 N.W.2d 578, 587 (Mich. Ct. App. 2007)

- Expert testimony that there was a causal connection between breathing dust from grinding brake linings containing chrysotile asbestos and mesothelioma was admissible.

Mississippi

Dalton v. 3M Co, MDL No. 875, Civ. No. 2:10-64604, 2011 WL 5881011, at *1 & n.1 (E.D. Pa. Aug. 2, 2011) (applying Mississippi law)

- Applying Mississippi law and denying summary judgment where the plaintiff "testified that he was exposed to and breathed in asbestos dust from pumps and valves. He identified working around Crane pumps and valves. He testified that he associated the insulation which was added to these pumps and valves with asbestos. He could not recall the number of times that he worked around Crane pumps and valves, but testified about working with pumps and valves on many occasions."

New Jersey

James v. Bessemer Processing Co., 714 A.2d 898, 911 (N.J. 1998)

- A plaintiff in an asbestos case may demonstrate "causation by establishing: (1) factual proof of the plaintiff's frequent, regular and proximate exposure to a defendant's products; and (2) medical and/or scientific proof of a nexus between the exposure and the plaintiff's condition."

Buttitta v. Allied Signal, Inc., No. L-9592-02, 2010 WL 1427273, at *9-10 (N.J. Super. Ct. App. Div. Apr. 5, 2010)

- "[W]e have recognized a distinction between diseases such as asbestosis and lung cancer caused by asbestos, which develop from continuous exposure to substantial quantities of asbestos over a period of years, and mesothelioma, which, as the experts here testified, can develop from the cumulative effects of even minimal and infrequent exposure to asbestos."

- "The frequency, regularity and proximity test is not a rigid test with an absolute threshold level necessary to support a jury verdict . . . . Tailoring causation to the facts and circumstances of the case, the frequency and regularity prongs become less cumbersome when dealing with cases involving diseases, like mesothelioma, which can develop after only minor exposures to asbestos fibers."

New York

In re New York City Asbestos Litig., 36 Misc. 3d 1234(A), 2012 WL 3642303, at *7-8 (N.Y. Sup. Ct. Aug. 20, 2012), *amended sub nom. Dummit v. Chesterton*, No. 1901962010, 2012 WL 7177916 (N.Y. Sup. Ct. Sept. 19, 2012)

- "An opinion on causation 'should set forth a plaintiff's exposure to a toxin, that the toxin is capable of causing the particular illness (general causation) and that plaintiff was exposed to sufficient levels of the toxin to cause the illness (specific causation).' *Parker v. Mobile Oil Corp, supra* at 448. However . . . 'it is not always necessary for

a plaintiff to quantify exposure levels precisely or use the dose-response relationship, provided that whatever methods an expert uses to establish causation are generally accepted in the scientific community.' *Id.* Moreover, 'so long as plaintiffs' experts have provided a scientific expression' of plaintiff's exposure's levels, they will have laid an adequate foundation for their opinions on specific causation.' *Nonnon v. City of New York,* 88 AD3d 384,396 (1st Dept 2011)."

- "Applying these standards, I conclude plaintiff established legally sufficient evidence of specific causation. . . . [Plaintiff's expert] Dr. Moline testified that there 'is no threshold that has been determined to be safe with respect to asbestos exposure and mesothelioma'; even low doses of asbestos can cause mesothelioma; plaintiff's cumulative exposures to asbestos were substantial contributing factors which caused his mesothelioma; each of the occupational exposures described contributed to causing the disease; and 'there's no way of separating them [the individual exposures] out.' Mr. Hatfield testified to the release of asbestos fibers into the air from the removal and replacement of gaskets, packing and insulation; the percentage of asbestos in gaskets and packing of, respectively, 60 to 85, and 15 percent; the existence of quadrillions of asbestos fibers in a standard gasket; and tests he performed showing that the removal of a gasket released from 2.3 fibers per cubic centimeter (CC) to 4.4 asbestos fibers per CC, compared to the highest measured background level of .0005, and that the removal of packing released from .2 to .3 fibers per CC."

- "Based on the foregoing, there is 'scientific expression' of the basis for the opinions." *Nonnon v. City of New York*, 88 AD3d 384, 396 (1st Dept. 2011). "Moreover, when the testimony of Dr. Moline and Mr. Hatfield is considered together with evidence that the ships on which plaintiff served contained hundreds of Crane's valves, there is legally sufficient evidence that plaintiff was exposed to asbestos while supervising routine maintenance work on Crane's valves so as to establish specific causation."

Decision and Order, *Prange v. Anchor Packing Co.*, Index No. 190226/10, slip op. at 2, 4 (N.Y. Sup. Ct. July 18, 2011) (attached as **App. A Ex. 4**)

- Denying defendant's motion for summary judgment where plaintiff testified that he "performed several brake jobs" on vehicles manufactured by defendant, and expert testified "to a reasonable degree of medical certainty that asbestos exposure was a substantial contributing cause of [his] lung cancer."

- The court rejected defendant's argument that plaintiff's "alleged exposure to asbestos from products manufactured or sold by [defendant] was so 'de minimus' that [plaintiff's] testimony is insufficient to create a triable issue as to the proximate cause of his lung cancer", and held that the issue was for the jury, "notwithstanding [plaintiff's] alternative occupational exposures and smoking history."

Berger v. Amchem Prods., 818 N.Y.S.2d 754, 762 (N.Y. Sup. Ct. 2006)

- "'It is not really important to have an epidemiological study to determine whether the risk of cancer is increased by asbestos exposure in every occupation'. Where, as here, extensive epidemiological evidence has been adduced that Chrysotile fibers cause mesothelioma and other asbestos diseases, and where it is undisputed that defendant's products were made up of as much as 50% chrysotile, even though they were embedded in resin and most but not all were shorter than five microns, and where the plaintiffs developed mesothelioma, there is sufficient empiric evidence to allow the jury to consider causation."

Ohio

Fisher v. Alliance Mach. Co., 947 N.E.2d 1308, 1316-17 (Ohio Ct. App. 2011)

- The first court in Ohio to address the "substantial contributing factor" test under Ohio Rev. Code Ann. § 2307.96.

- Denying summary judgment where evidence showed that plaintiff worked next to pipefitters for six years while they were removing and replacing insulation, and cutting and replacing asbestos gaskets and packing material throughout the plant.

Oregon

West v. Allied Signal, Inc., 113 P.3d 983, 987-88 (Or. Ct. App. 2005)

- Evidence that a defendant supplied asbestos gloves to plaintiff's workplace, and that the gloves generated dust, was sufficient to create a jury question on product identification and causation

Purcell v. Asbestos Corp., 959 P.2d 89, 94 (Or. Ct. App. 1998)

- "Under Oregon law, once asbestos was present in the workplace, it is the jury's task to determine if the presence of that asbestos played a role in the occurrence of the plaintiff's injuries."

- Any "minute exposure to airborne asbestos fibers could cause mesothelioma . . . ."

- Rejecting defendant's argument that "plaintiff was required and failed to show that exposure to its products, in itself, caused plaintiff's mesothelioma or that plaintiff would not have suffered the disease in the absence of exposure to [defendant's] products," and holding that "[I]n view of the medical evidence that a single exposure could have caused plaintiff's disease and that all exposures contributed to the likelihood of his contracting mesothelioma, a reasonable jury could find that the exposure to either or both of defendants' products was a substantial factor in causing plaintiff's disease."

Pennsylvania

Betz v. Pneumo Abex, LLC, 44 A.3d 27, 30, 55-57 (Pa. 2012)

- Holding that an expert opinion "to the effect that each and every fiber of inhaled asbestos is a substantial contributing factor to any asbestos-related disease" is not, in and of itself, sufficient to show specific causation, where there is no evidence of exposure beyond exposure to a single fiber, but noting that it was a "test case" "for the any-exposure opinion as a means, in and of itself, to establish substantial-factor causation," and that summary judgment could be avoided with additional evidence of exposure.

Gregg v. V-J Auto Parts, Co., 943 A.2d 216, 225 (Pa. 2007)

- The frequency, proximity, and regularity test is not a "a rigid standard with an absolute threshold necessary to support liability."

- The application of this test "should be tailored to the facts and circumstances of the case, such that, for example, its application should become 'somewhat less critical' where the plaintiff puts forth specific evidence of exposure to a defendant's product . . . and 'somewhat less cumbersome' in cases involving diseases that the plaintiff's competent medical evidence indicates can develop after only minor exposures to asbestos fibers."

Memorandum Decision, *Wolfinger v. 20th Century Glove Corp.*, No. 1392 EDA 2011 (Pa. Super Ct. Feb. 14, 2013) (attached as **App. A Ex. 5**)

- Expert testimony that each and every exposure to asbestos contributed to causation was admissible where evidence demonstrated that the decedent was exposed to asbestos while handling asbestos-containing welding rods manufactured by the defendant over twelve years.

Linster v. Allied Signal, Inc., 21 A.3d 220, 223-24, 229 (Pa. Super. Ct. Apr. 21, 2011)

- "In Pennsylvania, a plaintiff who suffers an asbestos related injury is not required to establish the specific role played by each individual asbestos fiber within the body; nor must the plaintiff quantify the specific level or duration of his asbestos exposure."

- "Instead, in order to make out a prima facie case, it is well established that the plaintiff must present evidence that he inhaled *some* asbestos fibers shed by the specific manufacturer's product. In assessing a plaintiff's evidence, Pennsylvania courts employ the frequency, regularity and proximity test."

- "The frequency, regularity and proximity test is not a rigid test with an absolute threshold necessary to support liability. Rather, application of the test should be tailored to the facts and circumstances of the case; for example, its application should become "somewhat less critical" where the plaintiff puts forth specific evidence of exposure to a defendant's product. Similarly, the frequency and regularity prongs become less cumbersome when dealing with cases involving diseases, like mesothelioma, which can develop after only minor exposures to asbestos fibers."

- "Although [the plaintiff] may have worked with other brands (which potentially contained asbestos), this issue relates to the apportionment of liability among co-defendants and does not affect the sufficiency of the [plaintiff's] proof with respect to Crane Company gaskets and packing."

Lilley v. Johns-Manville Corp., 596 A.2d 203, 208 (Pa. Super. Ct. 1991)

- "[E]ven one day's worth of . . . inhalation [of asbestos dust] constituted a 'substantial contributing factor'" to the plaintiff's development of an asbestos-related disease. Such evidence "was sufficient to permit the jury to infer that [the plaintiff] contracted . . . a disease caused by breathing, in his work place, asbestos fibers from products manufactured by . . . [the defendants]."

Hoffeditz v. AM Gen., LLC, MDL No. 875, Civ. No. 2:09-70103, 2011 WL 5881003, at 1 & n.1 (E.D. Pa. July 29, 2011) (applying Pennsylvania law)

- Denying summary judgment where plaintiff testified that he "worked with Cummins engines and that he worked around others working on Cummins engines. He testified that he removed gaskets from the engines which involved scraping the gaskets and that he was exposed to dust in this process. He testified that he was exposed to asbestos from Cummins engines and that he knew that the gaskets in the engines contained asbestos because the manufacturer's manuals called for the use of asbestos-containing products. Plaintiff has presented evidence that Cummins manufactured engines which contained asbestos-containing gaskets during this time frame."

Rhode Island

Decision, *Brandt v. A.W. Chesterton Co.*, C.A. No. PC 07-4811, slip op. at 7 (R.I. Super. Ct. July 25, 2008) (attached as **App. A Ex. 6**)

- Denying summary judgment where plaintiff alleged he was exposed to asbestos while working on and "nearby" defendant's products, but defendant averred that they did not make the product to which plaintiff claimed he was exposed.

- "[T]he questions of whether a Plaintiff was ever exposed to asbestos as a result of working near a Defendant's product, or whether such exposure was the cause of that Plaintiff's injury, are questions for the jury to determine."

Decision, *Downs v. 3M Co.*, C.A. No. PC 06-1710, slip op. at 2, 4 (R.I. Super. Ct. Oct. 16, 2007) (attached as **App. A Ex. 7**)

- Denying summary judgment where plaintiff alleged she used a tractor and combine manufactured by defendant, but defendant offered evidence that it "would have been impossible" for asbestos fibers to be released from these products.

- "[T]he issues of exposure and causal nexus are issues for trial. A trial allows a jury to hear expert testimony and determine the credibility of the witnesses."

Decision, *Hicks v. Am. Biltrite*, C.A. No. PC 06-2592, slip op. at 4-5 (R.I. Super. Ct. Oct. 16, 2007) (attached as **App. A Ex. 8**)

- Denying summary judgment where "[p]laintiff never exactly identified CertainTeed and Plaintiff only observed the roofing work" that was the basis of her exposure claim.

Texas

Borg-Warner Corp. v. Flores, 232 S.W.3d 765, 772-74 (Tex. 2007)

- Holding, in an asbestosis case, that plaintiff must show that the asbestos in the defendant's product was a substantial factor in bringing about the plaintiff's injuries, and that "proof of mere frequency, regularity, and proximity is necessary but not sufficient;" plaintiff must provide "[d]efendant-specific evidence relating to the approximate dose to which the plaintiff was exposed, coupled with evidence that the dose was a substantial factor in causing the asbestos-related disease."

Smith v. Kelly-Moore Paint Co., 307 S.W.3d 829, 834-35 (Tex. Ct. App. 2010)

- "[A] plaintiff in a mesothelioma suit that he or she claims is caused by an asbestos-containing product must prove the elements set forth in *Borg–Warner's* 'substantial factor causation test': specifically, an aggregate dose of exposure from the defendant's product and a minimum threshold dose above which an increased risk of developing mesothelioma occurs."

Case Management Order, *In re Asbestos Litigation in the District Court of Harris County, Texas*, Cause No. 2004-03964, at 4, 6 & 7 (Jan. 7, 2005) (GST-6481)

- Ruling, on a global summary judgment motion regarding responsible third party ("**RTP**") practice in asbestos cases, that a defendant must present sufficient evidence of negligence, causation, and damages to designate a RTP: "[T]he statute treats all of the listed entities [claimant, defendant, settling entities and responsible third parties]

as being subject to the same applicable standard, and therefore, causation is a prerequisite for entitlement to submission of a RTP to the jury."

- Under the causation standard established by *Borg Warner*, defendants must present evidence of the dose to which a claimant was exposed for each RTP they have plead. If the defendant fails to present such evidence, the RTP designation cannot survive summary judgment. "[P]roof of causation that is consistent with *Borg Warner* must be presented in order for a defendant to avoid dismissal of its RTP claims."

- Receipt of payment of funds from a trust is not proof of causation. Further, even if a trust submission stands as proof of exposure, it will not, without more, constitute evidence of causation. "Plaintiffs cannot be estopped from denying causation if they made no statement of causation in the prior proceeding. Most bankruptcy trusts apparently have either a relaxed causation requirement or a nonexistent one. None of them have anything that approaches *Borg Warner* standards. Unless a [claim form] requires a statement of causation, there can be no judicial estoppel."

Utah

Memorandum Decision and Order Denying Defendant Union Carbide Corporation's Motion to Exclude Expert Opinion Testimony that "Every Exposure" to Asbestos is a "Substantial" or "Contributing" Factor, *Larson v. Bondex Int'l, Inc.*, No. 2:08-CV-333 TS, slip op. at 2 (D. Utah July 21, 2011) (attached as **App. A Ex. 9**)

- Accepting the view that "every exposure" can be a "substantial factor."

Virginia

Ford Motor Co. v. Boomer, 736 S.E.2d 724, 729, 731 (Va. 2013)

- Holding that the traditional "but-for" standard of causation in cases of multiple exposures would make it "difficult if not impossible" for a plaintiff to recover, as he or she would face the task of "proving that any one single source of exposure, in light of other exposures, was the sole but-for cause of the disease," and also rejecting the "substantial contributing factor" causation test.

- The proper causation standard is the "sufficient to have caused" standard and the "multiple sufficient cause analysis" set out in the Restatement (Third) of Torts. Under this standard, an asbestos plaintiff must prove that exposure to a defendant's product occurred prior to the development of the plaintiff's illness and that such exposure alone was "sufficient to have caused the harm." The new standard "allows multiple tortfeasors to be found jointly and severally liable." Proof of other sufficient causes of harm would not provide a defense where the defendant's product alone was sufficient to cause the harm. The exposures need not have occurred at the same time.

Owens-Corning Fiberglas Corp. v. Watson, 413 S.E.2d 630, 639 (Va. 1992)

- Finding plaintiff had proven causation where the "medical witnesses testified that [plaintiff's] death was caused by mesothelioma attributed to multiple exposures to asbestos. Additionally, the medical evidence revealed that very limited exposure to asbestos fibers can cause mesothelioma. Owens-Corning admitted that it sold Kaylo to the Newport News Shipyard when [the plaintiff] was employed there. Watson testified in a pre-trial deposition that, as a pipe coverer, he handled and cut asbestos blocks in the engine rooms, boiler rooms, and other areas . . . . When Watson cut these blocks with a hand saw, visible dust was created."

- "A plaintiff may prove exposure to a particular manufacturer's product through circumstantial evidence."

Washington

Lockwood v. AC & S, Inc., 744 P.2d 605, 612-13 (Wash. 1987) (en banc)

- Finding sufficient causation evidence where plaintiff offered evidence that defendant's products were "used on a ship where [plaintiff] worked" and expert testimony that "all exposure to asbestos has a cumulative effect in contributing to the contraction of asbestosis . . . ."

Morgan v. Aurora Pump Co., 248 P.3d 1052, 1060-61 (Wash. Ct. App. 2011)

- Summary judgment not available to defendant pump and valve manufacturers where plaintiff was a pipefitter at shipyard for approximately nine years, co-worker testified that he saw worker work with defendants' pumps and valves, and that at least some, if not most, of gaskets and packing were made of asbestos, and medical expert concluded that that asbestos at shipyard was the cause of plaintiff's mesothelioma.

- "'The proximity and time factors can be satisfied if there is evidence that the plaintiff worked at a job site where asbestos products were used, particularly where there is expert testimony that asbestos fibers have the ability to drift over an entire job site.' *Allen*, 138 Wash.App. at 571, 157 P.3d 406."

- "It would be virtually impossible to know exactly how much time Morgan was exposed to the products of each Respondent. But [co-worker] Knowles testified that he saw [plaintiff] Morgan or workers around Morgan work with Respondents' pumps and valves, and both Knowles and Wortman testified that at least some, if not most, of the gaskets and packing were made of asbestos. Also, Morgan provided expert testimony that removing asbestos-containing gaskets and packing resulted in exposures to asbestos that were 'substantially above ambient levels.' This was also 'true whenever he remained in airspaces contaminated by such work conducted by others that involved gasket removal, fabrication, and replacement.'"

Allen v. Asbestos Corp., 157 P.3d 406, 409 (Wash. Ct. App. 2007)

- The proximity and time factors of substantial causation "can be satisfied if there is evidence that the plaintiff worked at a job site where asbestos products were used, particularly where there is expert testimony that asbestos fibers have the ability to drift over an entire job site."

Berry v. Crown Cork & Seal Co., 14 P.3d 789, 795 (Wash. Ct. App. 2000)

- Reversing trial court's grant of summary judgment where expert testified that asbestos fibers can drift over "an entire shipyard," leading court to find that there "is sufficient evidence from which it could be inferred that [the plaintiff] breathed the asbestos regardless of whether he worked on the ships or only in the shipyard."

Mavroudis v. Pittsburgh-Corning Corp., 935 P.2d 684, 688-89 (Wash. Ct. App. 1997)

- Substantial factor causation test ensures that no defendants will "enjoy a causation defense solely on the ground that the plaintiff probably would have suffered the same disease from inhaling fibers originating from the products of other suppliers."

Maritime

Bolton v. Air & Liquid Sys. Corp., MDL No. 875, Civ. No. 2:12-60128-ER, 2013 WL 2477169, at *1, n.1 (E.D. Pa. Apr. 30, 2013)

- "In order to establish causation for an asbestos claim under maritime law, a plaintiff must show, for each defendant, that '(1) he was exposed to the defendant's product, and (2) the product was a substantial factor in causing the injury he suffered.' *Lindstrom v. A–C Prod. Liab. Trust,* 424 F.3d 488, 492 (6th Cir. 2005)."

- "In establishing causation, a plaintiff may rely upon direct evidence (such as testimony of the plaintiff or decedent who experienced the exposure, co-worker testimony, or eye-witness testimony) or circumstantial evidence that will support an inference that there was exposure to the defendant's product for some length of time." "A mere 'minimal exposure' to a defendant's product is insufficient to establish causation. *Lindstrom,* 424 F.3d at 492. 'Likewise, a mere showing that defendant's product was present somewhere at plaintiff's place of work is insufficient.' *Id.* Rather, the plaintiff must show '"a high enough level of exposure that an inference that the asbestos was a substantial factor in the injury is more than conjectural."' *Id.* (quoting *Harbour v. Armstrong World Indus., Inc.*, 1991 WL 65201, at *4 (6th Cir. Apr. 25, 1991)). The exposure must have been 'actual' or 'real', but the question of 'substantiality' is one of degree normally best left to the fact-finder. *Redland Soccer Club, Inc. v. Dep't of Army of U.S.*, 55 F.3d 827, 851 (3d Cir. 1995)."

- Testimony was that "Mr. Bolton often had to remove gaskets and packing that he had previously installed with 'Buffalo' replacements," which "created visible dust which he breathed." The court denied summary judgment on the issue of specific causation because there was "evidence that Mr. Bolton was exposed to dust from replacement packing and gaskets supplied by [defendant] Buffalo and used with its pumps," and holding that "a reasonable jury could conclude from the evidence that Mr. Bolton was exposed to asbestos from replacement gaskets and/or packing manufactured and/or supplied by Defendant such that it was a 'substantial factor' in the development of his illness." *See Lindstrom,* 424 F.3d at 492; *Stark v. Armstrong World Indus., Inc.*, 21 F. App'x 371, 376 (6th Cir. 2001); *Abbay v. Armstrong Int'l, Inc.*, 2012 WL 975837, at *1, n.1 (E.D. Pa. Feb. 29, 2012).

Exhibit 1

Kazan McClain Lyons, Greenwood & Harley
Attn: Bosi, Justin
171 - 12th Street
3rd Floor
Oakland, CA 94607____

Herr & Zapala, llp
Attn: Zapala, Alan J
152 N. Third Street
Suite 500
San Jose, CA 95112

Superior Court of California, County of Alameda
Rene C. Davidson Alameda County Courthouse

Lindenmayer Plaintiff/Petitioner(s) VS. Allied Packing & Supply, Inc. Defendant/Respondent(s) (Abbreviated Title)	No. RG09483370 Order Motion for Summary Judgment Denied

The Motion for Summary Judgment was set for hearing on 06/18/2010 at 09:32 AM in Department 30 before the Honorable Kenneth Mark Burr. The Tentative Ruling required that the parties appear, and the matter came on regularly for hearing.

The matter was argued and submitted, and good cause appearing therefore,

IT IS HEREBY ORDERED THAT:

The motion is denied.

The motion by Defendants Copes-Vulcan, Inc., and Electrolux Home Products, Inc., as alleged successor in interest to Copes-Vulcan, Inc. ("Defendants"), for summary judgment or, in the alternative, for summary adjudication against the complaint by Plaintiffs Robert and Beverly Lindenmayer ("Plaintiffs") is ruled upon as follows:

The motion for summary judgment is DENIED. Defendants have not met their burden to show that Plaintiff does not have and cannot reasonably obtain evidence to prove that he was exposed to asbestos from a product provided by Defendants for use on the USS America while Plaintiff Robert Lindenmayer was serving on the ship. Plaintiffs' interrogatory responses are not factual devoid and clearly show the basis for the claims against these two defendants. The fact that Plaintiff Robert Lindenmayer and Jerry Brevik do not remember the brand names Copes-Vulcan or Electrolux is not sufficient to show that Plaintiff has no evidence, since there is no showing that either man would necessarily know the name of the manufacturer of the valves, soot blowers, and desuperheaters in Engine Room No. 2. Similarly, the fact that these men were not familiar with vendor drawings of the ship is not surprising or determinative of Plaintiffs' ability to prove that Defendants' equipment was installed in Engine Room No. 2 consistent with the vendor drawings. The presence of Defendants' new equipment in Engine Room No. 2 during the years of Plaintiffs' service would appear to be an appropriate subject for expert testimony, but Defendants' do not show that Plaintiffs lack any evidence concerning the presence of Defendants' products. Defendants do not attempt to establish that Plaintiff Robert Lindenmayer will be unable to show that he was more likely than not exposed to a threshold level of asbestos released from Defendants' equipment if Defendants' new valves, soot blowers, and desuperheaters were present in Engine Room No. 2 at the time of Plaintiff's service. Defendants' showing is limited to an attempt to show that Plaintiffs cannot show that their equipment was present.

In addition to the fact that Defendants have not met their initial burden so as to shift the burden of proof

to Plaintiffs, the motion for summary judgment also fails because Plaintiffs present affirmative evidence that Copes-Vulcan valves, soot blowers, and desuperheaters with their original gaskets and seals were installed in Engine Room No. 2. At the hearing, Defendant conceded that there is a triable issue with regard to product identification. And, although the moving papers did not attempt to show that Plaintiffs will be unable to prove that Plaintiff Robert Lindenmayer and his co-workers removed original asbestos-containing gaskets and packing in the valves, soot blowers, and desuperheaters in Engine Room No. 2, Plaintiffs have offered evidence that he and others working in close proximity to him performed this type of work regularly. See Plaintiffs' Additional Facts 70-95 and 98-111 and evidence cited in support.

Plaintiffs also provide affirmative evidence that the type of work performed by Plaintiff and his co-workers on the gaskets and packing installed on Defendants' equipment, or supplied by Defendants as spare parts, releases asbestos fibers into the air. Additional Facts 96, 112-115.

Defendants argued at the hearing that the circumstantial evidence of exposure to asbestos offered by Plaintiffs was not sufficient to create a triable issue with regard to exposure to asbestos from Defendant's product. Defendants contended that any inference of exposure is speculative, citing Dumin v. Owens-Corning Fiberglas Corp. (1994) 28 Cal.App.4th 650, 655-656. As noted above, this issue is not the basis for the motion, and Plaintiffs were not required to offer evidence on this issue. However, the Court does not agree that the evidence in this case lacks sufficient weight to support a reasonable inference of causation. Here, the evidence indicates that there were a number of pieces of Copes-Vulcan equipment present in Engine Room No. 2, and Defendants concede that there are triable issues regarding the presence of their equipment. There is evidence that Plaintiff worked in Engine Room No. 2 for three years, that the original gaskets and packing on Copes-Vulcan supplied equipment would have been replaced during that period of time, that Defendants provided some replacement gaskets, that the gaskets and packing contained asbestos, and that the process of replacing the gaskets and packing released dust into the air. This evidence goes well beyond the facts in Dumin, in which the plaintiff's evidence did not even show with certainty that the defendant's insulation product was present at the Norfolk Naval shipyard at the same time as the ship on which the plaintiff served, much less that the product was brought onto the ship and that Plaintiff was then exposed to asbestos fibers from the defendant's product.

The motion for summary adjudication of Plaintiffs' claim for punitive damages is DENIED. Plaintiffs' discovery responses are not factually devoid. Plaintiffs also have provided affirmative evidence to support their claim that Defendants were aware of the hazards created by asbestos but continued to market asbestos-containing products for many years without providing any warnings. Additional Facts 116-122 and evidence cited.

Defendants' request for judicial notice is GRANTED.

Plaintiffs' request for judicial notice is GRANTED.

Defendants' objections to the declaration of Capt. William Lowell in its entirety are OVERRULED.

Defendants' objections to Exhibit 2 to the declaration of Capt. William Lowell are OVERRULED.

Defendants' objections to the declaration of Kenneth Cohen in its entirety are OVERRULED.

Dated: 06/18/2010

facsimile

Judge Kenneth Mark Burr

Exhibit 2

DOCKET NO. CV 08- 5017803 S	:	SUPERIOR COURT
DONALD ACCURSO, ET AL	:	JUDICIAL DISTRICT OF FAIRFIELD
VS.	:	AT BRIDGEPORT
A. O. SMITH CORP., ET AL	:	JULY 15, 2011

MEMORANDUM OF DECISION
RE: MOTION FOR SUMMARY JUDGMENT (Motion #148.00)

FACTS

The plaintiffs, Donald and Greta Accurso, filed their original complaint on August 12, 2008, against various defendants, including A.O. Smith Corp. (A.O. Smith). Subsequently, the Accursos filed a fourth amended complaint on January 25, 2011. Count one of this complaint is directed to all defendants and alleges a claim pursuant to Connecticut's product liability statute, General Statutes § 52-572m et seq. Specifically, the Accursos allege that the various defendants, "mined, processed, manufactured, designed, tested and/or packaged various asbestos-containing products, and supplied, distributed, delivered, marketed and/or sold said asbestos-containing products to the employer(s) of the plaintiff . . . working at . . . various job sites in Connecticut . . . ." The Accursos alleged that while Donald Accurso was working, he was exposed to asbestos materials and forced to "breathe, inhale and ingest asbestos fibers and particles coming from said asbestos products and materials." The Accursos claim that the asbestos-containing products were unavoidably unsafe, failed to carry adequate, correct warnings, and failed to apprise users of the "full hazards and dangers of coming in contact with said products, including the risk of cancer."

As a result of the unreasonably defective asbestos-containing products, Donald Accurso has suffered severe, painful, permanent injuries and other asbestos-related pathologies. The second count, brought by Greta Accurso, alleges loss of consortium. Count three is directed to all defendants, and alleges that, from the 1930s, the defendants possessed medical and scientific material establishing that asbestos and asbestos-containing products were hazardous to the health and safety of all humans exposed to such products. The Accursos maintain that the defendants failed to publish such studies and reports, known throughout the industry, and still committed the alleged wrongful acts and/or omissions. Such acts and omissions, the Accursos allege, constitute grossly negligent, willful, wanton, malicious and outrageous misconduct.

A.O. Smith filed a motion for summary judgment on July 15, 2009, on the basis that no substantive evidence exists that "the plaintiff was exposed to respirable asbestos emanating from products produced, manufactured or sold by [A.O. Smith]." The motion is accompanied by a memorandum of law and an affidavit. On October 6, 2009, the Accursos filed a memorandum in opposition to the motion, with various evidentiary submissions. A. O. Smith filed a reply to the Accursos' opposition on May 4, 2011.

DISCUSSION

"Practice Book § 17-49 provides that summary judgment shall be rendered forthwith if the pleadings, affidavits and any other proof submitted show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." (Internal quotation marks omitted.) *Brooks v. Sweeney*, 299 Conn. 196, 210, 9 A.3d 347 (2010). "The party moving for summary judgment has the burden of showing the absence of any genuine issue of material fact and that the party is, therefore, entitled to judgment as a matter of law." (Internal quotation marks omitted.) Id., 210. "Only evidence that would be admissible at trial may be used

to support or oppose a motion for summary judgment." (Internal quotation marks omitted.) *Great Country Bank* v. *Pastore*, 241 Conn. 423, 436, 696 A.2d 1254 (1997).

A.O. Smith argues that the affidavit of its product safety manager establishes uncontroverted facts demonstrating that its products could not be the source of any asbestos that the plaintiff was exposed to." It maintains that the evidence clearly demonstrates that Donald Accurso is mistaken in identifying the undersigned party's products as being those he was exposed to. A.O. Smith concludes that its documentary evidence, and the lack of evidence submitted by the Accursos, conclusively demonstrates that there is no genuine issue of material fact that the plaintiff's health conditions were any way related to any alleged exposure to asbestos-containing products over his lifetime that were manufactured, sold, distributed or installed by A.O. Smith.

The Accursos counter that A.O. Smith has failed to prove the nonexistence of all genuine issues of material fact. They claim that Donald Accurso was exposed to A.O. Smith's asbestos-containing products through work on an A.O. Smith boiler and through asbestos drift. Further, they emphasize that complex cases, such as the present case, are inappropriate for summary judgment.

A.O. Smith's reply to the Accurso's opposition indicates that Donald Accurso died on January 20, 2011, and, as a result, the court has before it all of Donald Accurso's testimony that will ever be presented in support of his claim concerning exposure to asbestos-containing products attributed to A.O. Smith. A.O. Smith reiterates its position that such evidence is insufficient for purposes of its summary judgment and that, therefore, its motion should be granted.

A.O. Smith provides an affidavit from its product safety manager, Bradley N. Plank, that indicates the following. Plank was employed by a division of A.O. Smith from 1993 through 2007. In this capacity, the affiant was responsible for "maintaining all engineering drawings, product certifications, instruction manuals, and engineering parts lists for water products manufactured by A.O. Smith." Accordingly, Plank was familiar with, and had knowledge of, the products that A.O. Smith manufactured and supplied. Plank attested that A.O. Smith's boilers did not contain asbestos in any external parts but, rather, that it was located "in internal, self-contained parts." He attested that A.O. Smith's products "were pre-assembled before being delivered to its customers." Plank claimed that the water products "were never manufactured or sold with prefabricated sections that had to be assembled." He avers that the pre-assembled water products were "never manufactured or sold with any asbestos on the exterior," nor did A.O. Smith "supply or specify the use of asbestos-containing materials in conjunction with their product." Further, the affiant attested that A.O. Smith never manufactured commercial sectional boilers, and during the times relevant to the Accursos' complaint, independent corporations with no affiliation to A.O. Smith – manufactured boilers under the name "Smith."

A.O. Smith also attached an uncertified copy of excerpts of Donald Accurso's deposition transcripts.[1] This testimony reveals that Donald Accurso was a plumber pipefitter and, while employed at Karnes Heating and Plumbing, had occasion to take on a side job involving the removal of a big boiler which involved exposure to A.O. Smith products. According to the transcript, the removal process involved first eliminating "the asbestos and . . . the chicken wire

---

[1] Both the Accursos and A.O. Smith have submitted various pieces of uncertified evidence but neither side raises an objection. In the absence of an objection, the court may consider such evidence. *Barlow v. Palmer*, 96 Conn. App. 88, 92, 898 A.2d 835 (2006).

from the outside.... Then we went in the side with chisels and hammers and forced the sections apart so the push nipples would open. And then if we could, we'd carry it out. If not, we'd break it up with a sledgehammer." When asked how he knew the sectional boiler was an A.O. Smith product, Donald Accurso responded: "I can remember. The only time I remember, H.B. Smiths were smaller than the A.O. Smiths, that I remember. They were an older unit." He also recalled that the A.O. Smith name was on a metal piece affixed to one, or both, of the unit's doors. With respect to the removal of the chicken wire that went over the cast iron, he testified that the asbestos was stuck to the wire and he removed the asbestos with a hammer, chisel or trowel without wearing either gloves or a face mask. When describing the removal of the boiler, Donald Accurso explained that "[w]e tore out an old boiler, the boiler, itself, the piping, put a new boiler in and re-piped it. And we took all the asbestos off. Back in those days all the cast iron boilers we shrouded in chicken wire, blocks of asbestos, and asbestos made into a putty and spread around . . . ."

The Accursos, in turn, offered Donald Accurso's deposition testimony that basically mirrors that provided by A.O. Smith. The Accursos also attached the deposition of Bradley N. Plank, A.O. Smith's product safety manager. Plank testified that, to his "knowledge of A.O. Smith boilers having asbestos is that there were small components of the copper boilers that we made, and that [in 1980] we stopped putting those asbestos components in . . . ." Further, the Accursos provide an affidavit and a deposition taken from Edwin C. Holstein, M.D., an expert in the field of asbestos drift and "fugitive dust." Holstein testified that "based on the studies conducted by affiant, affiant has found that exposure to 'fugitive dust' has been associated with asbestosis; in particular, that he has personally found asbestosis in individuals whose only known exposure to asbestos occurred as a result of working approximately 500 feet from a source of

asbestos dust."

"On a motion by [the] defendant for summary judgment the burden is on [the] defendant to negate each claim as framed by the complaint . . . . It necessarily follows that it is only [o]nce [the] defendant's burden in establishing his entitlement to summary judgment is met [that] the burden shifts to [the] plaintiff to show that a genuine issue of fact exists justifying a trial." *Gianetti* v. *United Healthcare*, 99 Conn. App. 136, 141, 912 A.2d 1093 (2007).

In the present case, A.O. Smith has not met its burden of establishing its entitlement to summary judgment. There is conflicting evidence, raising a question of material fact, as to whether Donald Accurso, was exposed to an A.O. Smith boiler that contained asbestos components. Therefore, A.O. Smith has failed to negate the claims raised in the complaint as those allegations are directed to it. Accordingly, A.O. Smith's motion for summary judgment is denied.

By the Court,

BELLIS, J.

Exhibit 3

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

PETER & ELPIS CONSTANTINIDES	:	CONSOLIDATED UNDER MDL 875
Plaintiffs,	:	
v.	:	
LESLIE CONTROLS, INC., et al.,	:	CIVIL ACTION NO. 09-70613
Defendants.	:	

A M E N D E D M E M O R A N D U M

EDUARDO C. ROBRENO, J. October 8, 2010

Before the Court is the report and recommendation ("R&R") issued by issued by Magistrate Judge Elizabeth T. Hey, and joined by Chief Magistrate Judges Thomas J. Rueter and Magistrate Judge David R. Strawbridge ("the Panel"), and Defendant Leslie Controls, Inc.'s objections thereto.[1] The Panel recommends that the Court deny Defendant Leslie Controls, Inc.'s motion for summary judgment.[2] The issue before the Court revolves around product identification.

---

[1] This Court's Memorandum of September 30, 2010 (doc. no. 182) mistakenly stated that the R&R was issued by Chief Magistrate Judge Thomas J. Rueter. It was issued by Magistrate Judge Elizabeth T. Hey.

[2] This case was referred by Order of the Presiding Judge of MDL-875 to a panel of three magistrate judges pursuant to MDL-875 summary judgment procedures regarding issues of causation (product identification), successor liability and settled issues of state law. (See MDL-875 summary judgment procedures, available at www.paed.uscourts.gov/mdl1875y.asp; see also Constantinides v. Alfa Laval, doc. no. 147). In the instant case, the R&R was filed after the Panel heard oral argument on March 24, 2010.

I. BACKGROUND

Peter Constantinides initiated this action in August 2008 in the Circuit Court of the Eleventh Judicial Circuit in and for Miami-Dade County Florida, alleging negligence and strict liability claims against several defendants based on their failure to warn of the dangers associated with asbestos exposure. (R&R at 1). The case was subsequently removed the District Court and transferred to the Eastern District of Pennsylvania as part of MDL-875, the consolidated asbestos personal injury multidistrict litigation.

Mr. Constantinides was diagnosed with Mesothelioma in 2007. (R&R at 2). His only lifetime exposure to asbestos occurred during fifteen months while he served in the United States Navy on the U.S.S. Iowa from 1954 to 1956. Id. Mr. Constantinides was employed as a fireman's apprentice and then as a fireman on the U.S.S. Iowa, where one of his main assignments was to work in the boiler room. Id. The boiler room contained numerous pipes and machinery encased in external asbestos insulation and/or containing gaskets and other internal parts which were encased in asbestos. Id.

The record is unclear regarding the precise number of Leslie Controls, Inc. ("Leslie Controls") products were present in the boiler room in which Mr. Constantinides worked. (R&R at 3, n.3). However, the parties appear to agree that there were six Leslie

Controls valves present in the boiler room. (Id.; Deposition of Arnold P. Moore, doc. no. 125-6, at 247:7-8; Transcript of Oral Argument, doc. no. 141, March 2, 2010 at 93). Mr. Constantinides testified that he occasionally repaired pumps and motors by removing and replacing gaskets and bearings. (Pl. Video Dep., doc. no. 125-2, 56-59). Mr. Constantinides testified that his working environment was dusty. (Discovery Dep., Vol. I, doc. no. 127-2, at 20:8-9). According to a co-worker, Mr. Harris, Mr. Constantinides spent about 10 days cleaning and scraping the packing from valves and then repacking them, and that he breathed in the dust created by this work. (Robert L. Harris Dep., doc. no. 125-4, at 11-15, 52, 65). Plaintiffs' expert testified that Leslie Controls valves were specified for the use of external asbestos insulation. (Arnold Moore Dep., doc. no. 125-6, at 250, 253-54).

Defendant moved for summary judgment, arguing that Plaintiffs had failed to establish that Leslie Controls products were a cause of Mr. Constantinides's asbestos-related injuries. (Def.'s Mot. Summ. J., doc. no. 103). The Panel denied Leslie Controls's Motion for Summary Judgment, finding that plaintiffs had raised a genuine issue of material fact as to whether Defendant's products caused Mr. Constantinides's asbestos-related injuries.

Defendant raises objections to three of the Panel's

findings. First, Defendant objects to the finding that, despite Defendant's assertion that its valves were too small to be the type Mr. Constantinides worked on, there remains a genuine issue of fact as to causation. (Def.'s Objects., doc. no. 168 at 2). Second, Defendant argues that it cannot be held liable for asbestos insulation applied to its products that it neither manufactured nor supplied. (Id. at 2-3). Finally, Defendant objects to the finding that there is a "battle of the experts" regarding the medical causation of Mr. Constantinides's injuries. (Id.).

II. LEGAL STANDARD[3]

Pursuant to 28 U.S.C. § 636(b)(1)(C), "[a] judge of the Court shall make a de novo determination of those portions of the report or specified proposed findings or recommendations to which objection is made. A judge of the Court may accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate judge." Id.

When evaluating a motion for summary judgment, Federal Rule

[3] In multidistrict litigation, "on matters of procedure, the transferee court must apply federal law as interpreted by the court of the district where the transferee court sits." In Re Asbestos Prods. Liabl. Litig. (No. VI), 673 F. Supp. 2d 358, 362 (E.D. Pa. 2009). On substantive matters, including choice of law rules, the state law of the transferor district applies. Lou Levy & Sons Fashions, Inc. v. Romano, 988 F.2d 311, 313 (2d Cir. 1993). As there is no dispute to the application of Florida law in this case, this Court will apply Florida law.

of Civil Procedure 56 provides that the Court must grant judgment in favor of the moving party when "the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact . . . ." Fed. R. Civ. P. 56(c)(2). A fact is "material" if its existence or non-existence would affect the outcome of the suit under governing law. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). An issue of fact is "genuine" when there is sufficient evidence from which a reasonable jury could find in favor of the non-moving party regarding the existence of that fact. Id. at 248-49. "In considering the evidence, the court should draw all reasonable inferences against the moving party." El v. SEPTA, 479 F.3d 232, 238 (3d Cir. 2007).

"Although the initial burden is on the summary judgment movant to show the absence of a genuine issue of material fact, 'the burden on the moving party may be discharged by showing-that is, pointing out to the district court-that there is an absence of evidence to support the nonmoving party's case' when the nonmoving party bears the ultimate burden of proof." Conoshenti v. Pub. Serv. Elec. & Gas Co., 364 F.3d 135, 140 (3d Cir. 2004) (quoting Singletary v. Pa. Dep't of Corr., 266 F.3d 186, 192 n.2 (3d Cir. 2001)). Once the moving party has thus discharged its burden, the nonmoving party "may not rely merely on allegations or denials in its own pleading; rather, its response must--by

affidavits or as otherwise provided in [Rule 56]--set out specific facts showing a genuine issue for trial." Fed. R. Civ. P. 56(e)(2).

III. DISCUSSION

Pursuant to 28 U.S.C. § 636(b)(1)(C), the Court must apply a de novo standard of review to the portions of the R&R that Westinghouse has objected to. Defendants three objections are addressed ad seriatim.

A. There is no evidence that Mr. Constantinides worked on Leslie Valves

Defendant asserts that it is entitled to summary judgment because the Leslie Valves in the boiler room in which Mr. Constantinides worked were no larger than two and one-half inches in diameter, whereas Mr. Harris testified that the valves he and Mr. Constantinides cleaned were over a foot in diameter. (See Tr. of Oral Arg., doc. no. 141, at 93-94; Affidavit of Thomas McCaffery, doc. no. 103-5 at ¶ 8; Harris Dep., doc. no. 125-4, at 11). Defendant also asserts that there were far fewer Leslie Controls valves than Crane valves in the boiler room. (Tr. of Oral Arg. at 93-97).

The Panel correctly concluded that the factual record on the issue of the size of the pumps is not sufficiently developed to

support a grant of summary judgment in Defendant's favor. The Panel concluded that "certain technical aspects of the Leslie valves themselves remain unclear," particularly that Mr. McCaffery's testimony seems to be referencing the diameter of the pipes connected to Leslie Controls valves, but that there is no evidence on the record establishing the dimensions of the valves themselves. (R&R at 8).

However, the record is clear that Leslie Controls valves were one of only two types of valves in the boiler room in which Mr. Constantinides worked. Plaintiffs have produced expert testimony to the effect that Leslie Controls specified for the use of asbestos gaskets and packing, and that external asbestos insulation was applied to its valves. (Moore Dep. at 250, 253-54). Mr. Moore's testimony that Mr. Constantinides would have likely been present when asbestos gaskets and packing were changed on Leslie Controls valves, combined with Mr. Constantinides's and Mr. Harris's regarding the work performed on valves, is sufficient to raise a genuine issue of material fact as to causation.

B. Leslie Controls cannot be held liable for asbestos containing products that it did not manufacture, supply, or specify[4]

[4] It appears that Defendant is raising the "bare metal" defense for this first time in its objections to the magistrate judge's report and recommendation. Defendant did not raise this

Defendant asserts that it cannot be held liable for products that it did not manufacture or supply. While many courts hold that it is the responsibility of the manufacturer of the finished product to provide warnings, other courts find that the duty to warn remains when the manufacturer is aware of the risk that its product will pose once incorporated with the defective product. In the instant case, Defendant argues that it cannot be held liable because it did not manufacture or design asbestos-containing products. Rather, asbestos replacement asbestos parts and external asbestos insulation were added to Defendant's products.

The Florida Supreme Court has not addressed the issue of whether a component manufacturer can be held liable for harm caused by a finished product. Defendant urges the Court to look outside of Florida for support that the bare metal defense can, and should, be applied in this case. (Def.'s Mot. Summ. J., doc. no. 99 at 19-25).

Florida appellate courts have taken the approach that a component manufacturer can be held liable for a finished product in certain circumstances. For example, in Scheman-Gonzalez v. Saber Manufacturing Company the court held that the manufacturer

---

argument in its summary judgment brief, and it is not clear that it is timely raised. However, because this Court has determined that a remand of this entire issue is appropriate, we leave a determination of whether the defense was timely raised to the transferor court.

of a wheel rim (Titan), which was incorporated into defendant Saber's wheel, could be held liable for injuries occurring when a tire mounted on the wheel exploded. 816 So. 2d 1133 (Fl. Dist. App. Ct. 2002). Titan argued that it was merely a component manufacturer, but the court found a remaining question of fact as to whether Titan was required to warn plaintiff of the danger, whether the warning provided was adequate, and whether Titan's failure was the proximate cause of plaintiff's injuries. Id. at 1141.

However, in Kohler v. Marcotte, the court held that defendant, a mass-producer of engines, could not be held liable for harm caused by a lawnmower which incorporated one of its engines. 907 So. 2d 596 (Fl. Dist. App. Ct. 2005). The court determined that Kohler was entitled to a directed verdict in their favor, as Kohler did not "review the design of the lawn mower for safety." Id. at 598. The Kohler court relied on the Third Restatement of Torts, § 5(b)(1) (1997) which states that a non-defective component provider is subject to liability only if it "substantially participates in the integration of the component into the design." Id. The court emphasized that Kohler produced a "generic" engine that had many potential uses and incorporations. Id. at 599; see also Ford v. International Harvester Co., 430 So. 2d 912 (Fl. Dist. App. Ct. 1983)(holding that whether a component manufacturer is liable turns on trade

usage and custom, relative expertise of the supplier and manufacturer, and practicability of the supplier addressing the safety concerns).

Rather than engage in the risky exercise of predicting whether the Florida Supreme Court would adopt the approach of Kohler v. Marcotte and Scheman-Gonzalez, this Court finds that this issue is best left to the transferee court, with superior expertise and familiarity in the application of Florida law.[5]

Therefore, summary judgment on this ground is denied without prejudice, with leave to file in the transferor court.

C. There is no "battle of the experts" with respect to the medical cause of Mr. Constantinides's injury

Defendant objects to the Panel's finding that a grant of summary judgment is further precluded by the existence of a "battle of the experts" in this case. Defendant's expert,

---

[5] A multidistrict litigation transferee court has "authority to dispose of a cases on the merits - for example, by ruling on motions for summary judgment." MANUAL FOR COMPLEX LITIGATION § 22.36 (4th ed. 2010) (citing In re Temporomandibular Joint (TMJ) Prods. Liab. Litig., 113 F.3d 1484, 1488 (8th Cir. 1997)). Although the MDL court has such authority, and in the appropriate case the exercise of such authority generally promotes the multidistrict litigation goals of efficiency and economy, there are cases where ruling on summary judgment by the transferee court would not advance the litigation or serve a useful purpose. Id. (citing In Re Orthopedic Bone Screw Prods. Liab. Litig., MDL No. 1014, 1997 WL 109595 at *2 (E.D. Pa. Mar. 7, 1997)). This appears to be such a case, as Florida law is not settled on the merits of Westinghouse's "bare metal" defense.

toxicologist and industrial hygienist, Dr. Paustenbach, determined that the testimony regarding Mr. Constantinides's potential work with Leslie Controls valves was medically insufficient to cause injury. He surmised that the exposure resulting from replacing asbestos components of the valves in question would have produced an asbestos concentration in the boiler room no greater than found in ambient air. (Def.'s Objects., doc. no. 168, at 6).

Plaintiffs' expert, Dr. Abraham, opined that, "Mr. Constantinides' asbestos exposure was the cause of his asbestos-related pleural plaques and of his malignant mesothelioma." (doc. no. 125-8). Defendant asserts that this is a general, speculative statement and is insufficient to raise a genuine issue of material fact.

While it is true that Plaintiffs' expert does not directly controvert Defendant's expert, it is equally true that Defendant's expert report does not independently support a grant of summary judgment in this case. Rather, the scientific analysis of whether asbestos emitted from Leslie Controls was sufficient to cause injury is evidence to be considered by a jury in evaluating whether Leslie Controls products caused Mr. Constantinides's injuries.

When viewing the record as a whole, and in the light most favorable to Plaintiffs, there remains a genuine issue of

material fact as to whether Leslie Controls products caused Mr. Constantinides's injuries. In the instant case, Mr. Constantinides's exposure is concentrated in both time and place (2 years working in a boiler room on the U.S.S. Iowa). The record indicates that there were six Leslie Controls valves in that room, and that they contained asbestos gaskets, packing, and insulation. Further, Plaintiffs' experts opined that Mr. Constantinides was likely present while Leslie valves aboard the U.S.S. Iowa were being worked on, and that asbestos exposure was the cause of Mr. Constantinides's injuries. (Moore Dep. at 247-248; (Report of Dr. Abraham, doc. no. 125-8). The record is sufficient to raise a genuine issue of material fact as to whether asbestos components of Leslie Controls valves caused Mr. Constantinides's injuries.

IV. Conclusion

Defendant's objections to the Panel's Report and Recommendation are overruled. There remains a genuine issue of material fact as to whether the asbestos gaskets, packing, and insulation on Leslie Controls Valves in the boiler room of the U.S.S. Iowa were a substantial contributing factor to Mr. Constantinides's asbestos-related injuries.

However, the issue of whether Leslie Controls can be held liable for external asbestos insulation applied to its products is appropriate for adjudication in the transferor court, provided

this argument was timely raised.

An appropriate order follows.

Exhibit 4

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 30

----------X

WILHELM PRANGE and ROSEMARY PRANGE,

Plaintiffs,

-against-

ANCHOR PACKING COMPANY., et al.,

Defendants.

----------X

Index No. 190226/10
Motion Seq. 001

DECISION AND ORDER

SHERRY KLEIN HEITLER, J.:

In this asbestos personal injury action, defendant Ford Motor Company ("Ford") moves pursuant to CPLR § 3212 for summary judgment dismissing the complaint and all other claims asserted against it. For the reasons set forth below, the motion is denied.

BACKGROUND

This asbestos-related action was commenced by Wilhelm Prange and his wife Rosemary Prange to recover for personal injuries allegedly caused by Mr. Prange's exposure to a myriad of asbestos-containing products over the course of his more than fifty-year career as a mechanic. Plaintiff's allege that he worked with asbestos-containing gears, diesel and automobile engines, gaskets, brakes, pipe-coverings, cloth, cement, packing, and pipe and engine insulation. A long-term smoker, Mr. Prange has been diagnosed with lung cancer, which he attributes to his exposure to such products.

Relevant to this motion are plaintiffs' allegations that Mr. Prange was exposed to asbestos from brake pads manufactured and/or sold by defendant Ford. Mr. Prange testified[1] that he changed

[1] Mr. Prange was deposed over three days on June 23, 24, and 25, 2010. Copies of his deposition transcripts are submitted as defendant's exhibit D.

the brakes on two Ford trucks as part of his duties as a mechanic while serving in the German Army between 1961 and 1963. Mr. Prange could not recall who manufactured the brakes that he removed from these Ford-manufactured German Army trucks, but he did recall that he replaced them with asbestos-containing Bendix brakes. Plaintiff also testified that he performed several brake jobs on his own Ford cars many years later, namely a 1964 Ford Mustang and a 1989/90 Ford passenger van. Mr. Prange testified that at some point he removed the original Ford-installed brakes from each vehicle. He was unable to recall the brand name of the replacement brakes he used on those vehicles.

Defendant does not dispute that Mr. Prange was exposed to asbestos from brakes which were installed by Ford on its vehicles. What defendant argues is that Mr. Prange's alleged exposure to asbestos from products manufactured or sold by Ford was so "de minimis" that Mr. Prange's testimony is insufficient to create a triable issue as to the proximate cause of his lung cancer given his alternative occupational exposures and substantial smoking history.

Plaintiffs contend that Mr. Prange's testimony is enough to raise triable issues of fact sufficient to defeat this motion. Plaintiffs argue that Ford designed its cars to include asbestos brake pads, that it knew that these brake pads would have to be replaced, and that it failed to warn of the dangers associated with such replacements.

DISCUSSION

Summary judgment is a drastic remedy that must not be granted if there is any doubt about the existence of a triable issue of fact. *Tronlone v Lac d'Aminate du Quebec, Ltee*, 297 AD2d 528, 528-29 [1st Dept 2002]; *Reid v Georgia Pacific Corp.*, 212 AD2d 462, 462 [1st Dept 1995]. To obtain summary judgment, a movant must establish its cause of action or defense sufficiently to warrant judgment in its favor as a matter of law, and must tender sufficient evidence to demonstrate the

absence of any material issues of fact. *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; CPLR § 3212[b]. Mere boilerplate and conclusory allegations will not suffice. *Cawein v Flintkote Co.*, 203 AD2d 105, 106 [1st Dept 1994]. Should the moving party fail to present a *prima facie* case, the court need not consider the sufficiency of the opposing papers. *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985].

Here, defendant has failed to establish *prima facie* its entitlement to summary judgment insofar as it simply argues that Mr. Prange's exposure to asbestos-containing brakes manufactured or sold by Ford could not have caused his lung cancer. In support, defendant relies on several trial court decisions which purportedly stand for the proposition that de minimis levels of exposure in asbestos-related lung cancer cases cannot survive summary judgment. *See Thompson v A.C&S, et al.*, Index No. 111186/99 [Sup. Ct. NY. Co., Nov. 4, 1999]; *Stephens v. A.P. Green Industries, et al.*, Index No. 100785/00 [Sup. Ct. NY. Co. Dec. 12, 2000]; *Natalie v. A.C&S., et al.*, Index No. 11188/99 [Sup. Ct. NY. Co. Nov. 30, 1999]; *Klink v A.C.&S., et al.*, Index No. 107369/99 [Sup. Ct. NY. Co. Nov. 1, 1999]. However, these decisions are inconsistent with prevailing Appellate authority and provide no facts to show that they are consistent with this case. *See Reid v Georgia Pacific Corp.*, 212 AD2d 462, 462 [1st Dept 1995] [plaintiff need only demonstrate that he was exposed to asbestos fibers released from the defendant's product; *Cawein v Flintkote Co.*, 203 AD2d 105, 106 [1st Dept 1994] [it is sufficient for plaintiff to show facts and conditions from which defendant's liability may be reasonably inferred]; *Lincoln v Consolidated Edison Co., et al.*, 46 AD3d 1176 [3d Dept 2007] [Workers' Compensation Board erred in concluding that there could be no causal connection between plaintiff's exposure to asbestos and his lung cancer where physician opined that plaintiff's exposure was a significant cause of such cancer]).

While causation may be determined by the court as a matter of law, this court should not entertain such a request where multiple conclusions can be drawn from the record. *C.f. Derdiarian v Felix Contractor Corp.*, 51 NY2d 308, 315-316 [1980]. In this case, Ford does not dispute that Mr. Prange was exposed to asbestos from brakes pads which were installed by Ford on its cars, trucks, and passenger vans. *See Reid, supra*; *Cawein, supra*. Moreover, in Mr. Prange's pathology report, submitted herein as plaintiffs' exhibit 1, Dr. James A. Strauchen opines "to a reasonable degree of medical certainty that asbestos exposure was a substantial contributing cause of [his] lung cancer."

Overall, the court believes that these issues will necessarily require a jury to weigh competing evidence and reflect on the credibility of expert witnesses, notwithstanding Mr. Prange's alternative occupational exposures and smoking history. *See Dollas v W.R. Grace & Co.*, 225 AD2d 319, 321 [1st Dept 1996]; *Markowitz v S.C. Johnson & Sons, Inc.*, 182 AD2d 742 [2d Dept 1992].

Accordingly, it is hereby

ORDERED that Ford's motion for summary judgment is denied.

This constitutes the decision and order of the court.

DATED: July 18, 2011

SHERRY KLEIN HEITLER
J.S.C.

Exhibit 5

NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

MICHELLE WOLFINGER, ADMINISTRATRIX OF THE ESTATE OF ROBERT F. WOLFINGER Appellee v. 20TH CENTURY GLOVE CORPORATION OF TEXAS, ET AL. APPEAL OF: THE LINCOLN ELECTRIC COMPANY Appellant	IN THE SUPERIOR COURT OF PENNSYLVANIA No. 1393 EDA 2011

Appeal from the Judgment Entered April 13, 2011
In the Court of Common Pleas of Philadelphia County
Civil Division at No(s): January Term, 2005, No. 3053

BEFORE: MUNDY, J., OTT, J., and PLATT, J.*

MEMORANDUM BY MUNDY, J.: Filed: February 14, 2013

Appellant, The Lincoln Electric Company (Lincoln), appeals from the judgment entered April 13, 2011, awarding Appellee, the Estate of Robert F. Wolfinger (Estate), the sum of $952,281.68[1] for damages caused by Decedent, Robert F. Wolfinger's, exposure to respirable asbestos fibers contained in Lincoln's welding rods. After careful review, we affirm.

---

* Retired Senior Judge assigned to the Superior Court.

[1] The judgment amount includes the verdict award of $825,000.00 plus $127,281.68 delay damages.

On January 27, 2005, Decedent filed an asbestos product liability complaint against numerous defendants, including Lincoln, alleging he suffered from an asbestos related illness caused by his exposure to the defendants' products. Shortly thereafter, Decedent died and the administratrix of his Estate was duly substituted as plaintiff. Between March 9, 2007 and December 16, 2009, the various defendants, including Lincoln, filed myriad motions for summary judgment. On January 26, 2010, the trial court denied Lincoln's motions for summary judgment and the case proceeded to trial.

In anticipation of trial, Lincoln filed a number of motions *in limine* and pretrial motions. Among other issues, Lincoln objected to proceeding with a reversely bifurcated trial.[2] Lincoln also sought to preclude testimony or evidence from the Estate's causation expert on various grounds, including a ***Frye***[3] challenge to the scientific methodology employed when forming his opinions.

---

[2] In a reversely bifurcated trial, the jury in phase one is tasked with determining whether the plaintiff had contracted the asbestos caused illness (in this case Pleural Thickening); whether that condition caused disability, impairment, or death; and what amount of damages, if any, were incurred. In phase two, the jury is tasked with determining whether the plaintiff inhaled asbestos from the defendant's product; whether the product was defective; and whether the defective product was a factual cause of the plaintiff's injury. ***See Fritz v. Wright***, 907 A.2d 1083, 1095, n.10 (Pa. 2006).

[3] ***Frye v. United States***, 293 F. 1013 (D.C. Cir. 1923).

The trial court denied Lincoln's motions. Phase one of the trial took place from April 15, 2010 to April 23, 2010, wherein the jury determined Decedent suffered from asbestos-caused Pleural Thickening and awarded a damage amount of $825,000.00. Phase two of the trial took place from April 28, 2010 to May 5, 2010, wherein the jury found Lincoln's asbestos-containing welding rods were defective and were a factual cause of Decedent's injury.

Lincoln filed timely post-trial motions, seeking judgment *non obstante verdicto* (JNOV), new trial, or molding of the verdict. The trial court denied Lincoln's post-trial motions on November 3, 2010.[4] On April 13, 2011, upon praecipe of the Estate, judgment was entered in favor of the Estate and against Lincoln in the amount of $952,281.68. Lincoln filed a timely notice of appeal on May 11, 2011.[5]

On appeal, Lincoln raises the following issues for our consideration.

> I. Did the trial court commit prejudicial error in failing to exclude testimony from Plaintiff's proffered liability expert and failing to grant a judgment n.o.v. or a new trial in response to Lincoln's post-trial motions where:
>
> > a. The trial court, which denied Lincoln's request for a ***Frye*** hearing, erroneously permitted Plaintiff's liability

[4] Additionally, the Estate filed a motion for delay damages which the trial court granted, and molded the verdict accordingly. ***See*** n.1 ***supra***.

[5] Lincoln and the trial court have complied with Pa.R.A.P. 1925.

> experts in each phase of trial to opine that any exposure to asbestos is a substantial contributing factor to asbestos disease, a view that has been soundly rejected by the Pennsylvania Supreme Court in ***Gregg v. V-J Auto Parts Co.***, 943 A.2d 216 (Pa. 2007) and, more recently, in ***Betz v. Pneumo Abex LLC***, 44 A.3d 27 (Pa. 2012);[6] and
>
> b. The trial court erroneously admitted the testimony of Plaintiff's sole liability expert in Phase 2, Arthur Frank, M.D., even though Plaintiff's hypothetical questions to Dr. Frank had no evidentiary support and even though Dr. Frank had no expertise independent of the defective hypothetical questions to render any competent opinion about asbestos fiber release from welding rods; and

---

[6] The Estate avers that Lincoln has waived its challenge to the trial court's failure to hold a ***Frye*** hearing to test the scientific basis of Dr. Frank's expert opinion testimony by failing to include the claim in its Rule 1925(b) statement. Estate's Brief at 13. In its Rule 1925(b) statement, Lincoln, in pertinent part, averred the trial court erred "(1) in admitting the unreliable and incompetent expert testimony of Dr. Arthur Frank ... in support of [the Estate's] theory of causation; (2) in admitting the unreliable and invalid "each and every breath" testimony of Dr[.] Frank ... in support of [the Estate's] theory of causation." Lincoln's Pa.R.A.P. 1925(b) Statement of Matters Complained of on Appeal, 6/1/11, at 2, ¶2. Accordingly, we agree Appellant has waived its challenge to the trial court's failure to conduct a ***Frye*** hearing before admitting Dr. Frank's expert testimony. However, Lincoln claims the Estate's waiver argument "misses the point" and suggests its "arguments in support of [JNOV] have never turned on the trial court's erroneous failure to hold a ***Frye*** hearing *per se*, but rather on the legal insufficiency of Dr. Frank's 'any exposure' causation opinions as the sole support for his substantial factor opinion that welding rods caused harm in this case." Lincoln's Reply Brief at 4. Accordingly, it is in this context we view Lincoln's first issue.

c. Neither Plaintiff's hypothetical questions nor his experts' testimony met the legal standard for causation of asbestos-related disease?

II. Did the trial court commit prejudicial error in precluding all evidence regarding Plaintiffs applications to bankruptcy trusts and failing to grant a new trial in response to Lincoln's post-trial motions where:

a. Decedent's admissions of significant exposure to friable asbestos products in his applications for compensation to bankruptcy trusts were a critical element of Lincoln's defense and the trial court's erroneous preclusion of this relevant and admissible evidence, even after Plaintiff opened the door to its admission, prejudiced Lincoln's defense and allowed Plaintiff to manipulate the exposure evidence and undermine Lincoln's experts' credibility; and

b. The trial court at a minimum erroneously failed to compel production of any settlements received from bankruptcy trusts and to apply the trust recoveries to reduce the Phase 1 verdict pursuant to ***Reed v. Allied Signal***, 2010 Phila. Ct. Com. Pl. LEXIS 410, 20 Pa. D. & C.5th 385 (Philadelphia County, 2010), affd, ***Reed v. Honeywell Int'l, Inc.***, 2011 Pa. Super. LEXIS 4797 (Pa. Super. 2011), appeal denied by ***Reed v. Honeywell Int'l***, 2012 Pa. LEXIS 1942 (Pa., Aug. 23, 2012).

III. Did the trial court commit prejudicial error in permitting the case to be tried in a reverse-bifurcated manner or then refusing to empanel a new jury in the Phase 2 proceedings?

Lincoln's Brief at 8-9.

In all three of its issues, Lincoln challenges the trial court's refusal to grant its post-trial motions for JNOV or new trial. Our standard and scope of review for these questions are well established.

> In reviewing a motion for [JNOV], the evidence must be considered in the light most favorable to the verdict winner, and he must be given the benefit of every reasonable inference of fact arising therefrom, and any conflict in the evidence must be resolved in his favor. Moreover, a [JNOV] should only be entered in a clear case and any doubts must be resolved in favor of the verdict winner. Further, a judge's appraisement of evidence is not to be based on how he would have voted had he been a member of the jury, but on the facts as they come through the sieve of the jury's deliberations.
>
> There are two bases upon which a [JNOV] can be entered: one, the movant is entitled to judgment as a matter of law, and/or two, the evidence was such that no two reasonable minds could disagree that the outcome should have been rendered in favor of the movant. With the first a court reviews the record and concludes that even with all factual inferences decided adverse to the movant the law nonetheless requires a verdict in his favor, whereas with the second the court reviews the evidentiary record and concludes that the evidence was such that a verdict for the movant was beyond peradventure.
>
> Similarly, when reviewing the denial of a motion for new trial, we must determine if the trial court committed an abuse of discretion or error of law that controlled the outcome of the case.

Estate of Hicks v. Dana Companies, LLC, 984 A.2d 943, 950-951 (Pa. Super. 2009) (internal quotations and citations omitted), *appeal denied*, 19 A.3d 1051 (Pa. 2011).

In its first issue, Lincoln argues that the trial court erred in allowing, Dr. Frank, the Estate's phase-two expert witness, to testify on the issue of causation. Lincoln's brief at 18. Lincoln advances three bases for this contention. First, Lincoln argues the evidence was inadmissible because the scientific basis for the opinions expressed was questionable and should have been subjected to a ***Frye*** hearing. ***Id.*** Second, Lincoln argues that Dr. Frank lacked the appropriate qualifications to opine on "Decedent's alleged level of exposure from Lincoln products," and that the hypothetical questions posed to elicit such an opinion were "incomplete and inaccurate." ***Id.*** at 19. Third, Lincoln avers the opinions expressed were legally insufficient to establish causation in an asbestos case. ***Id.*** at 26. The former claims implicate Lincoln's motion for new trial, which, as noted above, we review for an abuse of discretion. The latter claim implicates its motion for JNOV, which presents a legal question.

We begin with Appellant's first two sub-claims. With respect to the trial court's evidentiary rulings, we recognize the following additional standard of review. "Generally, an appellate court's standard of review of a trial court's evidentiary rulings is whether the trial court abused its discretion; however, where the evidentiary ruling turns on a question of law our review is plenary." ***Buckman v. Verazin***, 54 A.3d 956, 960 (Pa. Super. 2012), *quoting* ***Dodson v. Deleo***, 872 A.2d 1237, 1241 (Pa. Super. 2005).

> In order to find that the trial court's evidentiary rulings constituted reversible error, such rulings

> must not only have been erroneous but must also have been harmful to the complaining party. Appellant must therefore show error in the evidentiary ruling and resulting prejudice, thus constituting an abuse of discretion by the lower court.

Whitaker v. Frankford Hosp. of City of Philadelphia, 984 A.2d 512, 522 (Pa. Super. 2009) (internal quotation marks and citations omitted). "An abuse of discretion may not be found merely because an appellate court might have reached a different conclusion, but requires a result of manifest unreasonableness, or partiality, prejudice, bias, or ill-will, or such lack of support so as to be clearly erroneous." ***Commonwealth v. Dengler***, 890 A.2d 372, 379 (Pa. 2005) (internal quotation marks and citations omitted).

In support of its central assertion that Dr. Frank's testimony was inadmissible, Lincoln relies heavily on our Supreme Court's recent decision in ***Betz v. Pneumo Abex LLC***, 44 A.3d 27 (Pa. 2012). Lincoln suggests ***Betz*** stands for the proposition that an "any-breath exposure" causation opinion is "insufficient to support the Phase[-]2 verdict." Lincoln's brief at 24. We conclude Lincoln misapplies the holding of ***Betz*** to this case. At the direction of the trial judge, the ***Betz*** case was presented as a test case for the question of whether an opinion that each exposure to respirable asbestos fibers contributes to the cause of an asbestos related disease is sufficient to establish substantial causation from a particular product **without** a review of the defendant's overall history of exposure to that product. ***Betz***, ***supra*** at 31. At issue in ***Betz***, therefore, was whether "the any-exposure opinion

[can serve as] a means **in and of itself**, to establish substantial-factor causation." ***Id.*** at 55 (emphasis added). As such, the trial court was not asked to consider Betz's individual exposure history in determining whether Betz met her burden in a summary judgment context to establish that the defendant's product was a substantial factor in causing her illness. ***Id.*** Rather, the trial court questioned whether substantial factor causation can be established based solely on an expert's "every breath" causation opinion in the absence of defendant's overall history of exposure to a particular product.

In ***Betz***, the trial judge required a ***Frye*** hearing to determine whether the expert's opinion in that case was based on accepted scientific methodology. ***Id.*** at 33. The trial court focused on Betz's expert's use of extrapolation to form his opinion. ***Id.*** Specifically, could the fact that every inhalation of asbestos fibers contributes to disease scientifically support, by extrapolation, a conclusion that any exposure to asbestos fibers from a particular product is a substantial factor in the cause of the disease? ***Id.*** It was that extrapolation, which the trial court found failed to satisfy ***Frye***. ***Id.*** at 34.

> In this regard, Dr. Maddox's any-exposure opinion is in irreconcilable conflict with itself. Simply put, one cannot simultaneously maintain that a single fiber among millions is substantially causative, while also conceding that a disease is dose responsive. Indeed, it is worth repeating the following excerpt from the pathologist's own testimony making the point:

> Now, individual exposures differ in the potency of the fiber to which an individual is exposed, to the concentration or intensity of the fibers to which one is exposed, and to the duration of the exposure to that particular material. *So those are the three factors that need to be considered in trying to estimate the relative effects of different exposures.* But all exposures have some effect.
>
> N.T., Oct. 17, 2005 (p.m.), at 37 (emphasis added). The any-exposure opinion, as applied to substantial-factor causation, does not consider the three factors which Dr. Maddox himself explains "need to be considered in trying to estimate the relative effects of different exposures." ***Id.***

Id. at 56 (footnote omitted).

Instantly, Lincoln asserts that "like Dr. Maddox in ***Betz***, Dr. Frank offered a broad-scale opinion on causation applicable to anyone inhaling a single asbestos fiber above the background exposure levels even though he, again like Dr. Maddox, acknowledged that asbestos-diseases are dose-responsive." Lincoln's Brief at 25 (internal quotation marks and citation omitted). However, Dr. Frank's each and every breath theory of general causation was not proffered to **alone establish substantial factor** causation of Decedent's illness and death from exposure to Lincoln's products. Other evidence, as discussed herein, was considered by the jury to determine if Decedent's exposure to respirable asbestos fibers from Lincoln's welding rods over time was a substantial factor in causing Decedent's illness. Importantly, the ***Betz*** Court noted that it was not

confronted with reviewing the adequacy of an "any-breath" opinion coupled with a specific history of a plaintiff's exposure to an identified product in the ***Betz*** case appeal. "There may have [] been other evidence upon which [***Betz***] might have relied to avoid the summary judgment ruling which ensued in her case after the more generic ***Frye*** determination covering all the test cases. In light of our review ... we refrain from comment on this separate question." ***Betz***, ***supra*** at 55 n.34 (citation omitted).

Dr. Frank's testimony that each exposure to respirable asbestos fibers contributes to asbestos-caused diseases addressed general cumulative causation and was relevant to, albeit not dispositive of, the issue of substantial factor causation from Lincoln's products. Dr. Frank did not opine by extrapolation of this fact of general causation that **any** exposure from Lincoln's products must be considered a substantial factor in causing Decedent's illness. Rather, Dr. Frank's expressed opinions regarding substantial factor causation were in response to hypothetical questions posed, which assumed particular circumstances, frequency, and duration of Decedent's exposure to respirable asbestos fibers from Lincoln's welding rods. Deposition of Arthur Frank, M.D., 4/20/10, 26-28. His responses were also grounded in his experience with welders, asbestos containing welding products, epidemiological studies, and encapsulation methods. ***Id.*** at 34-35, 38, 39.

For these reasons, we conclude the trial court did not abuse its discretion in admitting Dr. Frank's deposition testimony to the jury. Accordingly, the trial court did not err in refusing to grant Lincoln a new trial on these grounds.

We turn now to address Lincoln's third sub-claim, its assertion that the trial court erred in failing to grant its motion for JNOV where the Estate failed "to adduce any competent evidence that Decedent sustained "any exposure" to asbestos fibers from Lincoln's welding rods." Lincoln's Brief at 26. Underlying this claim is Lincoln's assertion that the hypothetical questions posed by the Estate's counsel to Dr. Frank "assumed 'facts' that had no support in the record, were never proved, and certainly were not admitted by Lincoln." ***Id.*** at 19, n.6. A portion of the pertinent testimony is as follows.

> BY [COUNSEL FOR THE ESTATE]:
>
> Q. Doctor, I would like you to discuss with me the case of a gentleman who, unfortunately, has passed away, by the name of Robert Wolfinger. First I'd like you to assume that in Phase One of this trial a jury has determined that he suffered from an asbestos-related illness, and I would also like you to assume that during the course of Mr. Wolfinger's career, he worked for a company by the name of Burdett Oxygen, and he worked for them for many, many years, I think to be exact, it was approximately 27 years. And during 12 years of his work, he worked as a maintenance man. And during those 12 years that he worked as a maintenance man, he would weld. And during that welding, he would be using rods which he characterized as 6010 rods, 7014 rods and 7018 rods, some or all of which

> contained asbestos. I would also like you to assume that during the course of doing that welding over 12 years Mr. Wolfinger testified that there were times when he would take those rods out of a box and that dust would be created that he inhaled. I would also like you to assume that there were times when he indicated that welding rods would be tossed on the floor and that flux would break off of those various rods that I mentioned and create more dust, and that on some occasions he would be cleaning the area where he had welded sometimes twice a day, which would also cause this dust to dissipate. Assuming that those rods or that some or all of those rods contained asbestos, do you believe the exposure to that dust would have contributed to any asbestos disease that the jury found that Mr. Wolfinger had?
>
> A. Yes.
>
> ...
>
> Q. Okay. And assuming that Mr. Wolfinger testified that when he would empty welding rods out of a box or when he would walk on a welding rod that still had flux it [sic] and dust would come up from that process and also cleaning up that area, dissipating the dust again, do you believe that that dust, assuming that those rods contained some asbestos fibers, would contribute to any asbestos disease that this jury has found Mr. Wolfinger had?
>
> ...
>
> THE WITNESS: Yes, I would believe that that asbestos, like any other asbestos, would contribute to whatever disease he is judged to have.

Deposition of Arthur Frank, M.D., 4/20/10, 26-28, 40 . The trial court noted that Decedent testified by deposition about his "regular exposure to asbestos at his full time job over the course of 25 years." Trial Court Opinion, 5/8/12,

at 7. The trial court found this evidence factually supported the hypothetical questions posed to Dr. Frank. ***Id.*** Based on our review of the record, we agree.

The trial court also found the evidence satisfied the Estate's burden to provide "evidence of frequent, regular and close exposure to Lincoln's asbestos-containing product." ***Id.***, *citing* ***Gregg v. V-J Auto Parts, Co.***, 943 A.2d 216 (Pa. 2007) (holding "each-and-every breath" theory of causation is insufficient to establish substantial factor causation without showing of frequent, regular and close exposure to asbestos from a defendant's product). Lincoln insists that Decedent's testimony about his exposure to "dust" from his handling and use of its asbestos-containing welding rods was legally insufficient to prove inhalation of respirable asbestos fibers. Lincoln's Brief at 26. Lincoln acknowledges that this Court's decision in ***Donoughe v. Lincoln Electric Co.***, 936 A.2d 52 (Pa. Super. 2007) establishes that "lay testimony can support a claim of exposure to asbestos." ***Id.*** at 72.

> In a products liability case involving asbestos exposure, a plaintiff must present evidence that he or she inhaled asbestos fibers shed by the defendant's product. Ideally, a plaintiff will be able to directly testify that he or she breathed in asbestos fibers and that those fibers came from the defendant's product. However, absent such direct evidence, a plaintiff may rely on circumstantial evidence of exposure, namely, the frequency of the use of the product and the regularity of his or her employment in proximity thereto.

Id. at 62 (internal quotation marks, brackets and citations omitted).

Indeed, the facts in ***Donoughe*** are strikingly similar to the facts presented to the jury in the instant case.

> During Phase II of the trial, Donoughe testified that he worked as a welder from 1974 to 2000, and during that time used Number 6011 welding rods, some of which were manufactured by Lincoln, and some of which were manufactured by Hobart. Donoughe knew that he had used 6011 welding rods manufactured by Lincoln and Hobart because he saw the respective manufacturer's name on the boxes of rods and the number 6011 on the rods themselves. Donoughe also testified that he inhaled dust emanating from the welding rods when he removed them from their containers and when he chipped, wire-brushed, or chiseled off a residue coating, known as slag, that was formed after the weld. He further testified that there were no warnings on the containers or rods concerning the dangers of inhaling asbestos dust. Dr. Epstein then testified that each and every inhalation of asbestos from any asbestos product, including welding rods, substantially contributes to asbestos-related diseases, such as Donoughe's lung cancer.
>
> Also during Phase II of the trial, Donoughe introduced evidence that the Lincoln and Hobart 6011 welding rods, which Donoughe had worked with and which emanated dust that he breathed, contained and were manufactured with asbestos.

Id. at 64-65.

Nevertheless, Lincoln sets forth the following argument.

> ***Donoughe*** has essentially been rendered irrelevant in light of ***Betz***, ***supra***. Indeed, after Dr. Maddox's "any exposure" testimony was precluded in Betz, summary judgment was granted in favor of defendants. ***Id.*** at 40. Clearly, then, a case cannot proceed to jury based solely on lay testimony that

> "dust" is associated with a product or, for that matter, an expert opinion based on lay testimony about "dust" versus respirable asbestos fibers. ***See, e.g.***, ***Betz***, 998 A.2d at 58, *citing with approval* ***Wehmeier v. UNR Industries, Inc.***, 572 N.E.2d 320, 326 (Ill. App. Ct. 1991) (discussing the relevance of factors such as the types of asbestos involved, the tendency of the defendants' products to release fibers into the air, and the character of the workplace in comparing the weight of differing exposures).

Lincoln's Brief at 26-27.

We disagree. Lincoln continues to misapply ***Betz***. As discussed above, our Supreme Court in ***Betz*** was faced with a case where the plaintiff's full history of exposure to the defendant's product was not presented and was thus faced with reviewing the trial court's determination of the ability of an expert to scientifically conclude that any exposure would be a significant factor in the cause of the defendant's asbestos-related disease. Accordingly, we conclude ***Betz*** did not render ***Donoughe*** "irrelevant."

Instantly, as in ***Donoughe***, Decedent's full history of exposure to the defendant's product was supplied to the jury together with Dr. Frank's expert opinion about general causation and substantial factor causation. The issues raised in Lincoln's defense, to wit, that its product contained only encapsulated asbestos incapable of releasing respirable asbestos fibers was just that, a defense fully presented to the jury. The jury was free to weigh, accept or reject Lincoln's evidence. ***See Donoughe***, ***supra*** at 65 (noting

testimony from defendant's expert witnesses was "a matter for the jury to accept in full, accept in part, or reject completely").

For these reasons, we conclude Lincoln's contention that the Estate failed to prove its case as a matter of law is without merit. We therefore conclude the trial court did not err in denying Lincoln's motion for JNOV.

In his second issue, Appellant argues that the trial court erred in refusing Lincoln's request to submit certain evidence to the jury. Lincoln's Brief at 29. Decedent made applications for compensation to certain bankruptcy trusts, which purportedly included admissions of exposure to those entities' products. ***Id.*** Lincoln asserts the evidence of those applications is admissible as an admission of a party-opponent. ***Id.*** at 31. Lincoln alternatively contends that even if evidence of Decedents' statements regarding exposure to products from bankrupt companies was not initially admissible, the Estate opened the door to such evidence when it read portions of Decedent's deposition referencing those products. ***Id.*** at 30. Lincoln also claims that the evidence is admissible for impeachment purposes, since Decedent's statements in his applications is at variance with his responses to Lincoln's interrogatories. ***Id.*** at 33. Lincoln maintains the trial court's ruling "severely prejudiced [its] liability defense." ***Id.*** at 31.

As noted above, we review a trial court's evidentiary decisions for an abuse of discretion. ***Dengler***, ***supra*** at 379. In denying Lincoln's motions in this regard, the trial court relied on this Court's decision in ***Ball v. Johns-***

Manville Corp., 625 A.2d 650 (Pa. Super. 1993), which addressed this issue. Trial Court Opinion, 5/8/12, at 6. Citing ***Ottavio v. Fibreboard Corp.***, 617 A.2d 1296, 1301 (Pa. Super. 1992) (*en banc*), the ***Ball*** Court held "that bankrupt defendants did not have to participate in the trial, and their names should not be submitted to the jury for a finding of liability." ***Ball***, ***supra*** at 660. Further, the ***Ball*** Court explained the reasons for that result as follows.

> Nothing precludes the solvent manufacturers in this case from obtaining contribution from the bankrupts when (and if) they emerge from reorganization proceedings. To hold otherwise would be to require an exercise in futility, for any finding of fault against the bankrupt manufacturers would be unenforceable under the automatic stay provisions of the Bankruptcy Code.

Id., *quoting* ***Ottavio***, ***supra*** at 1301.

Lincoln seeks to distinguish ***Ball*** as applying only to submitting the names of bankrupt defendants "to the jury for a finding of liability." Lincoln's Brief at 34, *quoting* ***Ball***, ***supra*** at 660. Lincoln avers that ***Ball*** does not "address ... [whether] any and all evidence relating to bankrupt companies must be precluded at trial. ***Id.*** However, the import of Lincoln's proposed use of the disputed evidence is the same. Lincoln sought to have the jury consider Decedent's exposure to asbestos from products of bankrupt companies to establish their relative culpability in causing Decedent's illness. Where the bankrupt defendants were not required to participate at trial, and a jury could make no determination in connection

with those defendants, the proposed evidence is not relevant to Lincoln's liability, which is based on Decedent's exposure to asbestos from its welding rods. Lincoln's insistence that Decedent could not have been so exposed was a defense not dependent on possible exposure to other products. As noted by the trial court, reference to the trust applications "would have only served the purpose of assigning blame to unrepresented, bankrupt, non-parties." Trial Court Opinion, 5/8/12, at 5.

We also agree with the trial court that the Estate did not open the door by presenting a portion of Decedent's deposition that referenced some of the products from bankrupt companies. "[Decedent] merely gave an occupational history in order to establish a timeline of exposure to the Lincoln welding rods." ***Id.*** Accordingly, we conclude the trial court did not abuse its discretion in refusing to permit reference to Decedent's applications to the bankruptcy trusts.

Lincoln alternatively argues that the trial court should have reduced the phase-one verdict by set-off of the amount of payments received from any bankruptcy trusts. Lincoln's Brief at 34. However, the record contains insufficient facts upon which to base such a molding of the verdict. While the fact of Decedent's application to bankruptcy trusts was discussed in the context of the preceding issue, Lincoln has not cited where it sought discovery of the status of those applications until it filed its belated motion for production filed November 23, 2010, well after the jury's verdict and past

the ten-day period to file post-verdict motions. ***See*** Pa.R.C.P. 227.1(c). Accordingly, the trial court did not abuse its discretion in denying Lincoln's post-verdict motion to mold the verdict.[7]

Lincoln's final issue faults the trial court's decision to overrule Lincoln's objection to the reverse bifurcation procedure employed for trial. "A trial court's decision to bifurcate a trial is made in its discretion." ***Donoughe, supra*** at 72. Lincoln avers that "[r]everse bifurcation is only appropriate in cases in which liability issues are fully conceded — and the only real remaining questions are damages and product identification." Lincoln's Brief at 35. Lincoln declares, "the trial judge denied Lincoln's motion opposing reverse bifurcation without performing the informed analysis and careful balancing of the parties' respective rights that Pennsylvania law requires." ***Id.*** at 36, *citing* ***Stevenson v. General Motors Corp.***, 521 A.2d 413, 419 (Pa. 1987).

In ***Stevenson***, the trial court held a bifurcated trial with a liability phase followed by the damages phase. Based on testimony implicating

---

[7] Lincoln cites to ***Reed v. Allied Signal***, 20 Pa. D. & C.5th 385 (Philadelphia 2010), *affirmed*, ***Reed v. Honeywell Int'l***, 40 A.3d 184 (Pa. Super. 2011) (unpublished memorandum), *appeal denied*, 51 A.3d 839 (Pa. 2012) in support of its contention that molding of the verdict was required. We note a decision of a trial court does not constitute binding precedent. ***Branham v. Rohm and Hass Co.***, 19 A.3d 1094, 1103 (Pa. Super. 2011), *appeal denied*, 42 A.3d 289 (Pa. 2012), *citing* ***U.S. Bank Nat'l Ass'n v. Powers***, 986 A.2d 1231, 1234 n.3 (Pa. Super. 2009).

liability but only adduced during the damages phase, the trial court granted the defendant's post-trial motion for a new trial on both liability and damages and determined the new trial would not be bifurcated. Affirming, our Supreme Court noted that a decision to bifurcate should be made only after careful consideration including any danger that evidence relevant to both issues may be offered at only one-half of the trial. ***Stevenson***, ***supra*** at 419. Instantly, Lincoln does not allege that evidence heard only in the second liability phase implicated the issue of damages found by the jury in phase one. Rather, Lincoln argues that the reverse bifurcation process is inherently prejudicial. "In this case, Lincoln demonstrated that the prejudice from reverse bifurcation would far exceed any possible efficiency benefit." Lincoln's Brief at 37. To that end, Lincoln submitted the opinions of two behavioral scientists critical of the procedure.

This Court has rejected similar arguments challenging the reverse bifurcation procedure in ***Donoughe***.

> [The defendants] contend that this long-standing practice, noted with equanimity by our Supreme Court in ***Fritz*** [**v. Wright**, 907 A.2d 1083 (Pa. 2006)], "is an innately prejudicial procedure because it forces a jury to form preconceptions about liability before hearing key evidence. It is especially prejudicial for defendants ... whose products, because of their chemical composition, could not release asbestos in respirable form." ... [The defendants'] main argument is that during Phase I, the jury received evidence that [the defendants'] products shed asbestos fibers that [the plaintiff] inhaled, but that [the defendants] could not present rebuttal evidence at that time. They assert that

> because of this circumstance, the jury had already reached its conclusion as to [the defendants'] **liability** by the conclusion of Phase I. However, this is a wholly unsubstantiated allegation that is not deducible from anything of record. Moreover, [the defendants] were fully able to present their evidence during Phase II, following [the plaintiff's] more detailed evidence of exposure to asbestos shed from their products. Phase II was when the jury was asked to determine which, if any, of the many defendants were liable for [the plaintiff's] asbestos-related injuries established during Phase I. Thus, there is simply no basis to conclude that [the defendants'] defense was hampered or prejudiced by being raised at the liability stage of the proceedings any more than if the trial had not been bifurcated.

Donoughe, ***supra*** at 71 (emphasis in original, citations to brief omitted). Instantly, Lincoln seeks to distinguish ***Donoughe*** because it did not address whether a "trial court *per se* abuses its discretion by automatically employing a reverse-bifurcation procedure simply because it is 'standard' in Philadelphia," and because defendant's in ***Donoughe*** did not create a record of expert opinions critical to the practice. Lincoln's Brief at 40. Lincoln's conclusion that the trial court did not make a considered decision is based on the trial court's statement to the jury that the practice was "standard." ***Id.*** at 36. The trial court responded as follows.

> The statements made by the [trial c]ourt are not an indication that the [trial c]ourt did not take into consideration the facts of the case or the positions of both parties in order to reach its decision. The [trial c]ourt was merely acknowledging that trying the case in a reverse bifurcated fashion was a scenario that both parties should have anticipated for an asbestos case.

Trial Court Opinion, 5/8/12, at 10.

Further, Lincoln's behavioral scientists' opinions about the inherent problems with reverse bifurcation cannot serve as a substitute for a showing of actual prejudice, which as in ***Donoughe***, is lacking in this case. As noted by the trial court, Lincoln's position "implies that a jury was unable to follow the basic instructions made by [the trial c]ourt stating that the damage award in Phase [one] must not play a role in their deliberation of the liability issue in Phase [two]." ***Id.*** at 10-11. The record does not support Lincoln's assertion that the jury in this case was actually confused, misled or prejudiced. Accordingly, we conclude the trial court did not abuse its discretion in overruling Lincoln's objection to the reverse bifurcation procedure employed in this case or denying a new trial on this ground.

In sum, we deem our Supreme Court's recent decision in ***Betz***, inapposite to the issues in this appeal and Lincoln's reliance on ***Betz*** misplaced. We conclude, for all the reason discussed above, the trial court did not abuse its discretion in permitting the Estate to submit the deposition testimony of Dr. Frank to the jury or in denying Lincoln's evidence of Decedent's applications to bankruptcy trusts. We conclude the trial court did not abuse its discretion in denying Lincoln's motion for a new trial on these grounds. Likewise, we discern no error in the trial court's denial of Lincoln's motion for JNOV under the facts of this case. Finally, we conclude the trial court did not abuse its discretion in overruling Lincoln's objection to reverse

bifurcation of the trial in this matter, and further conclude Lincoln has demonstrated no prejudice from the procedure. Accordingly, we affirm the April 13, 2011 judgment entered in this matter.

Judgment affirmed.

Exhibit 6

STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

PROVIDENCE, SC **File July 25, 2008** **SUPERIOR COURT**

ELIZABETH BRANDT as Executrix to the Estate of WILLIAM BRANDT and as Surviving Spouse	:	
v.	:	**C.A. No. PC 07-4811**
A.W. CHESTERTON CO., et al.,	:	

DECISION

GIBNEY, J. This an asbestos-related product liability case brought against a number of corporate defendants. In the instant matter, Defendant Caterpillar Inc. ("Caterpillar") moves for summary judgment pursuant to Super. R. Civ. P. 56. Plaintiff Elizabeth Brandt, as Executrix of William Brandt's estate and as his surviving spouse, objects to the motion.

Facts and Travel

William Brandt and Elizabeth Brandt filed a complaint in this Court on September 12, 2007, alleging, inter alia, that Mr. Brandt had suffered serious injuries as a result of occupational exposure to asbestos. Mr. Brandt is now deceased and has been substituted by Mrs. Brandt, in her capacity as Executrix of his estate.

Before his death, Mr. Brandt completed an exposure chart and was deposed. His testimony indicates that he was exposed to asbestos through various products at a number of worksites and home maintenance projects between 1940 and 1993. From 1943 to 1952, Mr. Brandt was an enlisted member of the United States Army, serving time at Fort Sill, Oklahoma; Okinawa, Japan; and Whitney, England. During his time in the military, Mr. Brandt worked as a heavy truck driver and mechanic. His work involved the maintenance of vehicles, trucks, jeeps,

tractors, bulldozers, and other heavy equipment. In addition to the work he performed on the brakes, clutches, and engines of these vehicles, Mr. Brandt contended that he frequently worked in the vicinity while other maintenance work was performed on the vehicles. He claimed that he was exposed to asbestos fibers both by directly working on asbestos-containing machine parts and by working in close proximity when air hoses were used to clear the dust after machine maintenance had been completed.

Mr. Brandt's deposition testimony indicates that during his time in the Army, he occasionally assisted with work directly performed on Caterpillar machinery. He further recalled working next to Caterpillar machinery while working in a large hangar called a "motor pool," where the Army's machinery was repaired. Mr. Brandt recalled that the Caterpillar machines he directly assisted in maintaining were likely road graters or maintainers; machines used to level gravel.

Caterpillar has filed the instant motion for summary judgment, contending that Plaintiffs have failed to properly identify Caterpillar products as required by Rhode Island law. Caterpillar contends that Mr. Brandt, although stating in his deposition that he recalled assisting with work on specific Caterpillar products, was unable to provide sufficient information regarding the number of times he was exposed to asbestos from Caterpillar products, and under what conditions. Defendant Caterpillar further alleges that Mr. Brandt's identification of "Caterpillar Maintainers" was flawed, as no such product existed between 1943 and 1952. Caterpillar avers that all information taken together—and for purposes of this motion, taken as true—leaves significant gaps in the evidence such that a jury would have to improperly rely on speculation to find that Caterpillar was liable for Mr. Brandt's injuries.

Standard of Review

"Summary judgment is proper if no genuine issues of material fact are evident from 'the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any' and, in addition, the motion justice finds that the moving party is entitled to prevail as a matter of law." Lavoie v. N.E. Knitting, Inc., 918 A.2d 225, 227-228 (R.I. 2007) (citing Super. R. Civ. P. 56(c)). It is well-settled that a genuine issue of material fact is one about which reasonable minds could differ. See e.g. Brough v. Foley, 572 A.2d 63, 67 (R.I. 1990).

The moving party bears the initial burden of establishing that no such issues exist. Heflin v. Koszela, 774 A.2d 25, 29 (R.I. 2001). If the moving party is able to sustain its burden, then the "litigant opposing a motion for summary judgment has the burden of proving by competent evidence the existence of a disputed issue of material fact and cannot rest upon mere allegations or denials in the pleadings, mere conclusions or mere legal opinions." Am. Express Bank, FSB v. Johnson, 945 A.2d 297, 299 (R.I. 2008) (citations omitted). Although the opposing party must demonstrate evidence beyond mere allegations, it need not disclose all of its evidence. See e.g. Ludwig v. Kowal, 419 A.2d 297, 301 (R.I. 1980); Nichols v. R.R. Beaufort & Assoc., Inc., 727 A.2d 174, 177 (R.I. 1999); see also Bourg v. Bristol Boat Co., 705 A.2d 969, 971 (R.I. 1998) (citations omitted).

The trial judge reviews the evidence without passing upon its weight and credibility, and will deny a motion for summary judgment where the party opposing the motion has demonstrated the existence of a triable issue of fact. See Mitchell v. Mitchell, 756 A.2d 179, 181 (R.I. 2000); Palmisciano v. Burrillville Racing Ass'n., 603 A.2d 317, 320 (R.I. 1992). However, the Court will enter summary judgment "against a party who fails to make a showing

sufficient to establish the existence of an element essential to that party's case." Lavoie, 918 A.2d at 227-228.

Analysis

Plaintiffs object to Caterpillar's motion for summary judgment, contending that it is both premature and inappropriate under the circumstances. Plaintiffs argue that Caterpillar has failed to respond to the master set of interrogatories, which was served several times on behalf of several different and related plaintiffs. The master set of interrogatories was served in this matter on June 2, 2008. Plaintiffs additionally contend that they have established a triable issue of fact with regard to Mr. Brandt's exposure to Caterpillar's asbestos-containing products.

Summary judgment is premature when discovery is incomplete. See Sheinkopf v. Stone, 927 F.2d 1259, 1263 (D. R.I. 1993). Caterpillar contends that the outstanding discovery requested in this case is unnecessary, and that sufficient time for discovery has been allowed. Defendant further suggested in oral argument that Plaintiffs' timing in requesting responses to the master set of interrogatories in this case, as well as their insistence that discovery is yet incomplete, is merely a ploy to defeat Caterpillar's summary judgment motion. Caterpillar argues that the master set of interrogatories was served in a related matter involving a different plaintiff several months ago, but notes that that case was dismissed before the responses were due. Therefore, Caterpillar avers that the fact that it has yet to respond to the master set of interrogatories is the result of Plaintiffs' failure to serve them for this particular matter before June 2, 2008—only a few weeks before argument on this motion was heard—rather than the result of its own failure to properly fulfill its discovery requirements.

This Court is not persuaded by Caterpillar's argument. The fact that counsel served the master set of interrogatories on behalf of the Plaintiffs in this case within a month of the motion

hearing does not alone support the contention that the timing was a disingenuous attempt to defeat summary judgment. The rules of discovery in Rhode Island are liberal, and an attorney may request a reasonable time for discovery prior to summary judgment. See Velez-Rivera v. Agosto-Alicea, 437 F.3d 145, 151 (1st Cir. 2006) (citations omitted); Thibeault v. Square D Co., 960 F.2d 239, 242 (1st Cir. 1992) (finding that a party in a simple products liability case could not claim lack of time for discovery to oppose summary judgment where the case had been pending for two and a half years). In this matter, less than a year has passed since the complaint was filed. Although the case initially was placed on an accelerated schedule, Mr. Brandt's death has lessened the exigency of the matter. While the trial date is approaching, the Court finds that Defendant's answers to the master set of interrogatories are indeed necessary for the Plaintiffs' case and that the motion for summary judgment is premature. Rhode Island Depositors' Economic Protection Corp. v. DiLorenzo, 683 A.2d 370, 371-372 (R.I. 1996); Super. R. Civ. P. 56(f) (stating that if a party opposing summary judgment has provided reasons for his or her inability to present facts essential to justify their opposition, the trial court may, in its discretion, deny summary judgment and allow further discovery to be taken).

Even if the motion were not premature, this Court finds that Plaintiffs' have presented a material issue of fact, making this case inappropriate for summary judgment. Lavoie, 918 A.2d at 227-228 (R.I. 2007). In asbestos litigation, the plaintiff must identify the Defendant's asbestos product and establish that the product was a proximate cause of his or her injury. Celotex Corp. v. Catrett, 477 U.S. 317, 319-320 (1986). Caterpillar contends that Plaintiffs in this case cannot demonstrate these essential elements without leaving evidentiary gaps. Although Mr. Brandt identified Caterpillar products specifically in his deposition testimony, Caterpillar contends that it did not manufacture the specific machinery (maintainers or road graders) described by Mr.

Brandt. Although Mr. Brandt stated clearly that he worked in an Army hangar near Caterpillar-manufactured, asbestos-containing machine parts while said parts were repaired, Caterpillar contends that he cannot show he was close enough to these products with enough frequency to prove that exposure to the products caused his illness. Finally, Caterpillar contends that it cannot be held liable simply because its name is lumped together with other manufacturers.

In making its argument, Caterpillar relies primarily on Lavoie v. Northeast Knitting Inc., which stated, in the context of an undue influence case, that "complete failure of proof concern[ing] an essential element of the nonmoving party's case necessarily renders all other facts immaterial." 918 A.2d at 228. While this Court agrees that failure to provide any evidence of an essential element would be grounds for summary judgment, such failure simply does not exist here. Mr. Brandt's testimony suggests both product identification and exposure. See Gorman v. Abbott Laboratories, 599 A.2d 1364 (R.I. 1991); Thomas v. Amway Corp., 488 A.2d 716, 718-722 (R.I. 1985); see also Welch v. Keene, 575 N.E. 2d 766 769 (Mass. App. Ct. 1991) (stating "[i]t is enough . . . to reach the jury [if the plaintiff] show[s] that he worked with, or in close proximity to, the defendants' asbestos products").

Mr. Brandt's deposition testimony indicated that he directly assisted in repairing the asbestos-containing brakes, clutches, gaskets, and engine parts of Caterpillar machinery, and that he worked in close proximity to other maintenance that was performed on Defendant's products. Caterpillar argues that vague terms such as "in his presence" or "nearby" are insufficient to establish proximity. However, it has cited no case law to support such an assertion. With regard to Caterpillar's argument that no time period has been established, this Court cannot agree. Mr. Brandt stated that he was exposed to asbestos from Caterpillar machinery while he served in the military, between 1942 and 1953.

Although Caterpillar intends to negate Mr. Brandt's evidence as to the identity of the product and the time exposed, the evidence provided by Caterpillar is inconclusive. Therefore, this Court is unable make a finding of product identity and exposure without issuing a credibility determination and weighing the evidence; actions inappropriate for the Court on summary judgment. See Palazzo v. Big G. Supermarkets, Inc., 110 R.I. 242, 292 A.2d 235 (1972).

As it has found in previous cases, this Court reiterates that the questions of whether a Plaintiff was ever exposed to asbestos as a result of working near a Defendant's product, or whether such exposure was the cause of that Plaintiff's injury, are questions for the jury to determine. See e.g. Totman v. A. C. and S., Inc., C.A. No. 00-5296, 2002 R.I. Super. LEXIS 23 (February 11, 2002); Downs v. 3M Co., C.A. No. 06-1710, 2007 R.I. Super. LEXIS 146 (R.I. Super. Ct. 2007). The parties here clearly have presented contradictory evidence as to product identity, and, therefore, summary judgment is inappropriate in this case.

Conclusion

Summary judgment is an extreme remedy that should not be used as a substitute for trial or as a device intended to impose a difficult burden on the nonmoving party to save his or her day in court. Estate of Giuliano v. Giuliano, 2008 R.I. LEXIS 74, 21-22 (R.I. June 20, 2008); North Am. Planning Corp. v. Guido, 110 R.I. 22, 25, 289 A.2d 423, 425 (1972). It is not for the Court to sift out cases that are weak, improbable or unlikely to succeed, and so summary judgment will be denied unless a case is "legally dead" on arrival. Mitchell, 756 A.2d at 185. Plaintiffs have set forth a prima facie case and have established that genuine issues of material fact exist as to the essential elements of their claim. Accordingly, Caterpillar's motion for summary judgment is denied.

Counsel shall prepare the appropriate order for entry.

Exhibit 7

STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

PROVIDENCE, SC **Filed October 16, 2007** **SUPERIOR COURT**

MARILYN DOWNS and ERIN DOWNS, a minor, Plaintiffs

v.

3M COMPANY, et al. Defendants

C.A. No. PC 06-1710

DECISION

GIBNEY, J. The Defendant, John Deere Company ("John Deere"), moves for summary judgment pursuant to Super. R. Civ. P. 56. The Plaintiffs, Marilyn Downs ("Ms. Downs") and her minor child, Erin Downs (collectively "Plaintiffs"), object to the motion.

Facts and Travel

Ms. Downs filed a complaint in this Court on March 24, 2006, alleging, inter alia, that she suffered asbestos-related injuries after working as a general laborer on a corn farm in Nebraska in 1979. Ms. Downs contends that she used a tractor and combine manufactured by John Deere, and that she was present when the owner of the farm cleaned the asbestos containing engine of the tractor with an air hose and when he removed the wheels of the tractor to check the brakes.

John Deere has filed the instant motion for summary judgment, positing that no engine parts were removed, replaced, or exposed during the inspection periods. John Deere submits the testimony of Thomas Hitshusen, an engineer for John Deere, to support its assertion that no asbestos fibers could have been released from the tractor or combine engines during the inspections as they were described by Ms. Downs. Defendant further contends that the brake

systems were "wet," or bathed with oil, so that the release of asbestos fibers from the brake system would have been impossible. John Deere further asserts that Ms. Downs was not in close enough proximity to the machines as they were inspected to have inhaled or ingested any released asbestos fibers. Defendant argues that summary judgment is appropriate in this case, as Ms. Downs has provided no evidence to contradict its conclusions.

Standard of Review

In reviewing a motion for summary judgment, the Court must view all facts and reasonable inferences in a light most favorable to the nonmoving party. Delta Airlines, Inc. v. Neary, 785 A.2d 1123, 1126 (R.I. 2001) (citations omitted). Summary judgment is appropriate if there are no material facts in dispute, and the moving party is entitled to judgment as a matter of law. Id. The moving party bears the initial burden of establishing that no genuine issues of material fact exist. Heflin v. Koszela, 774 A.2d 25, 29 (R.I. 2001). If the moving party is able to sustain its burden, then the opposing party must demonstrate the existence of substantial evidence to dispute the moving party on a material issue of fact. See id.; see also Hydro-Manufacturing, Inc. v. Kayser-Roth Corp., 640 A.2d 950, 954 (R.I. 1994); Bourg v. Bristol Boat Co., 705 A.2d 969, 971 (R.I. 1998) (citations omitted). The opposing party need not disclose all of its evidence, but it must demonstrate that evidence beyond mere allegations exists to support its factual contentions. See e.g. Ludwig v. Kowal, 419 A.2d 297, 301 (R.I. 1980); Nichols v. R.R. Beaufort & Assoc., Inc., 727 A.2d 174, 177 (R.I. 1999); see also Bourg v. Bristol Boat Co., 705 A.2d 969, 971 (R.I. 1998) (citations omitted). The trial judge does not pass upon the weight and credibility of the evidence and will deny a motion for summary judgment where the party opposing the motion has demonstrated the existence of a triable issue of fact. See Palmisciano v. Burrillville Racing Ass'n., 603 A.2d 317, 320 (R.I. 1992) (citations omitted).

Analysis

Plaintiffs oppose summary judgment, contending that Ms. Downs's deposition testimony provides sufficient evidence of product identification and causal nexus between Defendant's product and Ms. Downs's injury to survive summary judgment. See Celotex Corp. v. Catrett, 477 U.S. 317, 319-320 (1986). Plaintiffs posit that Ms. Downs identified John Deere as the manufacturer of the farm equipment that she used and that she witnessed her employer inspecting the machines. Plaintiffs argue that John Deere engine gaskets contain asbestos, a fact that John Deere has not denied, and that whether such asbestos could have been airborne when an air hose was used to clean the engine is a genuine dispute of fact for trial.

Plaintiffs compare their case to this Court's decision in Totman v. A. C. and S., Inc., C.A. No. 00-5296, 2002 R.I. Super. LEXIS 23 (February 11, 2002). They contend that here, as in Totman, the Plaintiff identified the product, asserted that Defendant's product contained asbestos, and that Plaintiff worked in close proximity to Defendant's product. Id. The possibility that Defendant's product contained asbestos was not foreclosed by Defendant's evidence in either case. Id. Finally, the questions of whether the Plaintiff was ever exposed to asbestos by working near the Defendant's product or whether such exposure was the cause of Plaintiff's injury, were found in Totman to be questions for the jury to determine. See Totman, C.A. No. 00-5296, 2002 R.I. Super. LEXIS 23 (February 11, 2002).

This Court agrees that similarities exist between Ms. Downs's case and the situation in Totman. There, Mr. Totman never worked directly with the GE turbines that were alleged to cause his injury, but the issue of whether asbestos from installing the turbines could have been airborne and affected a nearby worker was in dispute. Here, similarly, Defendant argues that the connection is too attenuated, but again, Ms. Downs has offered testimony identifying

Defendant's product and establishing that she was in close proximity to the machines when the asbestos-containing parts were exposed and cleaned. As in Totman, this Court finds that the issues of exposure and causal nexus are issues for trial. A trial allows a jury to hear expert testimony and to determine the credibility of the witnesses. See Palazzo v. Big G. Supermarkets, Inc., 110 R.I. 242, 292 A.2d 235 (1972). Summary judgment is not intended as a substitute for trial, and a trial judge cannot pass on the weight of the evidence. See North Am. Planning Corp. v. Guido, 110 R.I. 22, 25, 289 A.2d 423, 425 (1972). Because the parties have presented contradictory evidence, the Court finds that this case does not warrant summary judgment.

Conclusion

Summary judgment is an extreme remedy. North Am. Planning Corp. v. Guido, 110 R.I. 22, 25, 289 A.2d 423, 425 (1972). It is not for the Court to sift out cases that are weak, improbable, or unlikely to succeed, and so summary judgment will be denied unless a case if "legally dead" on arrival. Mitchell v. Mitchell, 756 A.2d 179, 185 (R.I. 2000). Ms. Downs has set forth a prima facie case, and has established that material issues of fact exist for trial. Accordingly, John Deere's motion for summary judgment is denied. Counsel shall prepare the appropriate order for entry.

Exhibit 8

STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

PROVIDENCE, SC SUPERIOR COURT

(FILED – OCTOBER 16, 2007)

DEBORAH HICKS and
WILLIAM HICKS :

v. : C.A. No. PC 06-2592

AMERICAN BILTRITE, et al. :

DECISION

GIBNEY, J. The Defendant, CertainTeed Corporation ("CertainTeed"), moves for summary judgment pursuant to Super. R. Civ. P. 56. The Plaintiffs, Deborah Hicks and William Hicks, object to the motion.

Facts and Travel

This is an asbestos-related product liability action which was commenced in May of 2006 against sixty-eight defendants. Deborah Hicks ("Plaintiff") and her husband, William Hicks ("Plaintiff spouse") allege that Plaintiff was exposed to various asbestos products and materials during her employment with Bell Telephone Company and in the process of renovating her deli. The instant application is brought by Defendant CertainTeed. Plaintiff contends that as a young teenager she was exposed to asbestos-containing roofing materials manufactured, supplied, or sold by CertainTeed when her brothers-in-law used these products in a small roof-repair project on a business attached to her family's home. Plaintiff alleges that she has developed mesothelioma and other asbestos-related pathologies as a result of this exposure.

CertainTeed now moves for summary judgment, contending that Plaintiff cannot meet her *prima facie* burden of product identification and cannot prove a causal nexus between Defendant's asbestos-containing product and Plaintiff's injury. Specifically, CertainTeed

challenges Plaintiff's identification of its product, as during her deposition Plaintiff initially identified the roofing product used by her brothers-in-law as "Bondex." Only after admitting mental fatigue and returning from a break did Plaintiff identify the product as "CertainTeen, or something like that." Depo. Trans. of Deborah Hicks, Vol. II at 473-474. Furthermore, CertainTeed submits the affidavit of Charles B. Blakinger in support of its assertion that Plaintiff's description of the roofing materials used (rolled roofing, cements, and coatings) is inconsistent with CertainTeed roofing products at the time period in question (approximately 1957 – 1962). CertainTeed claims that it did not produce rolled roofing, like the one described by Plaintiff during the time period at issue, and that the CertainTeed roofing cements and coatings that may have contained asbestos at that time were not dusty and would not have released asbestos fibers. CertainTeed further claims that Plaintiff has failed to demonstrate a causal connection between her injuries and any CertainTeed product, as she has produced no evidence to show that she directly handled or was in close proximity to the roofing materials that may have contained asbestos. Plaintiff was, at most, a remote observer.

Plaintiff rebuts CertainTeed's motion, arguing that she has given specific testimony regarding her exposure to Defendant's asbestos containing products. Plaintiff points to her deposition, in which she testified that she had helped her brothers-in-law mix a powder substance with water, and that she recalled the powder's name as something similar to CertainTeed. Plaintiff contends that the issues regarding whether or not CertainTeed's products contained asbestos and to what extent her exposure to the products contributed to her asbestos-related disease were questions for the jury. Plaintiff also contends that CertainTeed's motion is premature, as CertainTeed has failed to fully respond to discovery requests; it has refused to

produce lists, brochures, and other information regarding asbestos-containing products sold by CertainTeed during the relevant time period.

Standard of Review

In deciding a motion for summary judgment, the trial judge considers the pleadings, depositions, answers to interrogatories, admissions on file, and affidavits and determines whether these documents, when viewed in a light most favorable to the nonmoving party, present a genuine issue of fact. Delta Airlines, Inc. v. Neary, 785 A.2d 1123, 1126 (R.I. 2001) (citations omitted); Volino v. General Dynamics, 539 A.2d 531, 532-533 (R.I 1988). The moving party bears the initial burden of establishing that no genuine issues of material fact exist. Heflin v. Koszela, 774 A.2d 25, 29 (R.I. 2001). If the moving party is able to sustain its burden, then the opposing party must demonstrate the existence of substantial evidence to dispute the moving party on a material issue of fact. See id.; see also Hydro-Manufacturing, Inc. v. Kayser-Roth Corp., 640 A.2d 950, 954 (R.I. 1994); Bourg v. Bristol Boat Co., 705 A.2d 969, 971 (R.I. 1998). The opposing party need not disclose all of its evidence, but it must demonstrate that evidence beyond mere allegations exists to support its factual contentions. See e.g., Ludwig v. Kowal, 419 A.2d 297, 301 (R.I. 1980); Nichols v. R.R. Beaufort & Assoc., Inc., 727 A.2d 174, 177 (R.I. 1999); see also Bourg v. Bristol Boat Co., 705 A.2d 969, 971 (R.I. 1998) (citations omitted). If the opposing party can demonstrate the existence of a triable issue of fact, the motion for summary judgment will be denied. See e.g., Palmisciano v. Burrillville Racing Ass'n., 603 A.2d 317, 320 (R.I. 2001).

Analysis

Summary judgment is premature when discovery is incomplete. See Sheinkopf v. Stone, 927 F.2d 1259, 1263 (D. R.I. 1993). Here, Plaintiff asserts that Defendant has failed to respond

completely to discovery requests. CertainTeed claims that some of the requested discovery has been made available, but is kept in a document repository in Washington, D.C. As the Plaintiff has not yet had the opportunity to travel to Washington, D.C. to determine the content of the documents, the Court finds that discovery is legitimately on-going.

Beyond the fact that the motion for summary judgment is premature in this case, the Court also finds that there is a material issue of fact. In asbestos litigation, the plaintiff must identify the defendant's asbestos product and establish that the product was a proximate cause of his or her injury. See Celotex Corp. v. Catrett, 477 U.S. 317, 319-320 (1986). CertainTeed contends that Plaintiff cannot demonstrate the unity of product and exposure—Plaintiff never exactly identified CertainTeed and Plaintiff only observed the roofing work—and therefore, Plaintiff cannot sustain her claim of a material fact. However, Plaintiff has provided deposition testimony to indicate that a product similar in title to CertainTeed was used in a roofing project, and that it was a dry product which she helped to mix. Plaintiff has asserted that her contention about the physical nature of the product will be supported by expert testimony, which need not be fully explored at this stage of discovery.

In its argument before this Court, CertainTeed claimed that Plaintiff's deposition testimony was not credible, and that Plaintiff has therefore failed to challenge CertainTeed's findings that its product could not have caused her injury. CertainTeed has essentially asked the Court to make a credibility determination, which is inappropriate in a summary judgment review; the Court cannot pass on the weight of the evidence or the credibility of the witnesses. See Palazzo v. Big G. Supermarkets, Inc., 110 R.I. 242, 292 A.2d 235 (1972). Therefore, the existence of contradicting evidence put forth by the parties indicates that summary judgment is inappropriate in this case.

Conclusion

Defendant's Motion for Summary Judgment is premature in this case, and the Court, having viewed the evidence in a light most favorable to the Plaintiff, finds that a genuine issue of material fact exists for a jury to determine. See Sturbridge Home Builders, Inc. v. Downing Seaport, Inc., 890 A.2d 58, 62 (R.I. 2005). Therefore, CertainTeed Corporation's Motion for Summary Judgment is denied. Counsel shall prepare the appropriate order for entry.

Exhibit 9

IN THE UNITED STATES COURT FOR THE DISTRICT OF UTAH

CENTRAL DIVISION

DIANNA K. LARSON and MERLIN B. LARSON, Plaintiffs, vs. BONDEX INTERNATIONAL, INC., et al., Defendants.	MEMORANDUM DECISION AND ORDER DENYING DEFENDANT UNION CARBIDE CORPORATION'S MOTION IN LIMINE TO EXCLUDE EXPERT OPINION TESTIMONY THAT "EVERY EXPOSURE" TO ASBESTOS IS A "SUBSTANTIAL" OR "CONTRIBUTING" FACTOR Case No. 2:08-CV-333 TS

The Court has before it Defendant Union Carbide Corporation's ("Union Carbide") Motion in Limine to Exclude Expert Opinion Testimony that "Every Exposure" to Asbestos is a "Substantial" or "Contributing" Factor.[1] Union Carbide contends that such evidence is directly contrary to controlling law, which requires a plaintiff to demonstrate that exposure to a defendant's product was a substantial factor in bringing about the alleged injury.

[1]Docket No. 152. This Motion is joined by Defendant Georgia-Pacific, LLC. *See* Docket No. 169.

Union Carbide contends that Utah law requires a showing of duration and intensity of an alleged exposure, which necessarily precludes any testimony that "every exposure" is a "substantial factor." The Court finds Union Carbide's position unsupported by Utah law. Although duration and intensity are certainly relevant considerations in determining whether something is a substantial factor, the test is much more nuanced:

> The word "substantial" is used to denote the fact that the defendant's conduct has such an effect in producing the harm as to lead reasonable men to regard it as a cause, using that word in the popular sense, in which there always lurks the idea of responsibility, rather than in the so-called "philosophic sense," which includes every one of the great number of events without which any happening would not have occurred. Each of these events is a cause in the so-called "philosophic sense," yet the effect of many of them is so insignificant that no ordinary mind would think of them as causes.[2]

Thus, as recently explained by the State of Utah Third District Court, this approach varies from case to case.[3]

As Union Carbide's Motion is based on a flawed view of Utah law, the Court finds the Motion fails. In addition, as to Union Carbide's contentions based on *Daubert*, the Court finds persuasive the reasoning set forth previously in this matter by Judge Robreno[4] and adopts it here.

Based on the foregoing, it is therefore

ORDERED that Defendant Union Carbide Corporation's Motion in Limine to Exclude Expert Opinion Testimony that "Every Exposure" to Asbestos is a "Substantial" or "Contributing" Factor (Docket No. 152) is DENIED.

---

[2]*Holmstrom v. C.R. England, Inc.*, 8 P.3d 281, 292 (Utah Ct. App. 2000).

[3]*See* Docket No. 164, Ex. 3, at 4.

[4]*Larson v. Bondex Int'l*, 2010 WL 4676563 (E.D.Pa. Nov. 15, 2010).

DATED July 21, 2011.

BY THE COURT:

TED STEWART
United States District Judge